Republicans Turn Tail on Dornan-Sanchez

CALIFORNIA★POLITICAL
REVIEW
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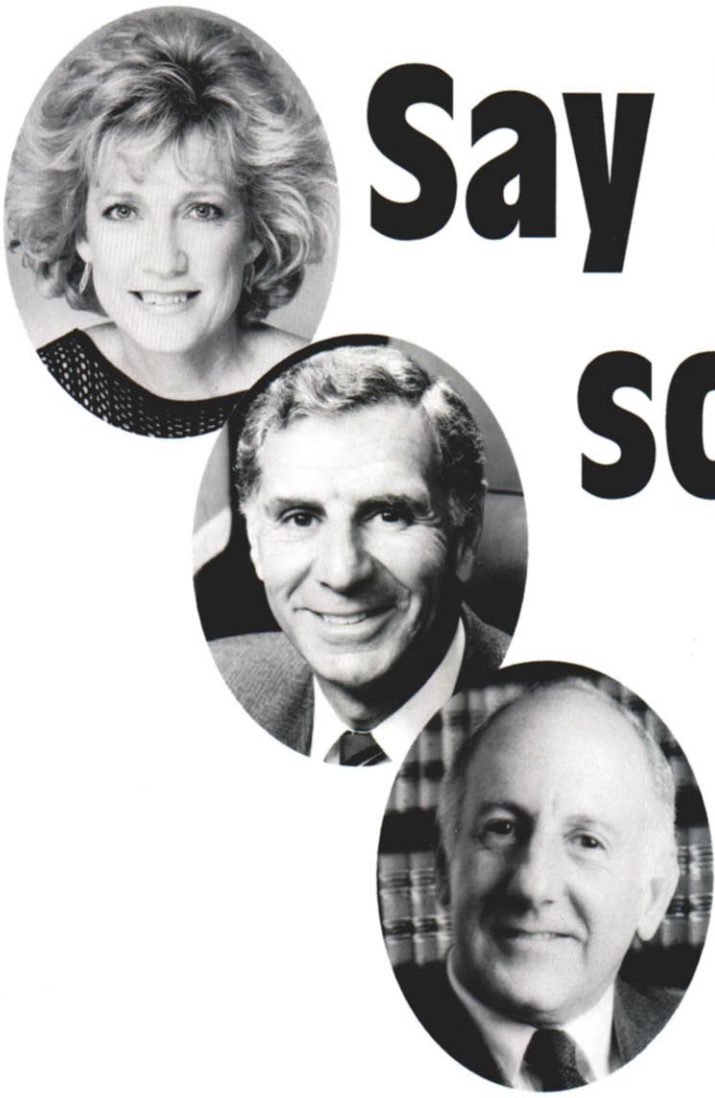
A *California Political Review* debate

Resolved:
Michael Capizzi
has been a good Orange County D.A.

Affirmative: Edward R. Jagels
Negative: Leon McKinney



Say it ain't so, Duke

Twenty years ago, George Deukmejian blasted judges for doing the same thing he is now apparently willing to overlook. He had it right the first time.

by Mark S. Pulliam

Judges' War on Property Rights
By Gideon Kanner

The State's War on Sexual Abstinence
By Steve Baldwin

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— Irving Kristol

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SACRAMENTO SPECTATOR

Just as prognosticated in your *Spectator's* last column, Cruz Bustamante beat a hasty retreat out of the Assembly speakership under heavy pressure from fellow Democrats not pleased with the prospect of him using that office as a springboard to run for lieutenant governor instead of looking after the interests of his Assembly flock.

His replacement, L.A. Democrat Antonio Villaraigosa, is far more stridently liberal than Bustamante. Villaraigosa won the office only by promising to strike a moderate course until the November election, presumably so as not to scare off moderate voters who might still be fooled into voting for ultra-liberals masquerading as mainstream candidates. This won't be easy for the ferociously liberal Villaraigosa, but his caucus is prepared to replace him if he breaks his promise.

Meanwhile, the Republicans are playing defense and quietly trying to recruit quality candidates for their competitive districts and raise gobs of campaign cash. They are doing much better at the latter than the former. Several long-time GOP districts lost to the Democrats in 1996 by razor-thin margins are without top-notch Republican challengers to vulnerable Democrat freshmen. This is especially sad in the Glendale/Burbank-based 43rd district, which Democrat Scott Wildman won by fewer than 100 votes. Also weak is the GOP field in the southeast L.A. County 56th district of freshman Democrat Sally Havice.

If the Republicans ever *do* manage to find decent candidates, they *have* taken a giant first step toward funding them properly. None other than Mayor Willie

Brown of Babylon-by-the-Bay headlined Bill Leonard's first fund raiser.

The event broke all records for Assembly GOP Sacramento events, raising more than $500,000. Brown's appearance was widely read as a sign he was unhappy with someone in the Democrat Capitol ranks. Willie is capable of exceptional pettiness, so the candidates for his pique were many. A tip of the *Spectator's* fedora to Bill Leonard and his fund-raising team of John Bovée and Ken Bell for seizing this golden opportunity.

The Senate GOP was disappointed as first-rank potential candidates fell by the wayside in the last minutes of filing. However, arithmetic still favors upper house Republicans — Democrats hold 13 of the 20 seats up in November. Early tea leaves make it hard to see a GOP pickup of more than two, but it is quite early to make any concrete predictions.

Your *Spectator* is much more conservative than Assemblyman Brooks Firestone, but always considered him a man of honor who would do the proper thing when it really mattered. Thus it was disappointing to see him decide not to run for re-election to the Assembly as a way of punishing the GOP for preferring Tom Bordonaro for the vacant central coast 22nd district congressional seat. Make no mistake, Firestone was in a huff and pouting after GOP voters resoundingly rejected his "passionate centrism." Brooks could easily have retaken his Assembly seat, but just to put a thumb in the eye of GOP loyalists he decided, at the last minute, not to run, making his district *very* vulnerable in November. Sad to see this class act end on a petty, selfish note.

There is *much* else to report, but it all must wait until next issue. Right now I must lock myself in my room for a 45-minute laugh at the news Pete Wilson plans yet another run for president in 2000 .....

— A. P. C.

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ACADEME

A Munitz Encore?

Former staff chief to Florida's Democrat Governor and Senator Bob Graham, new CSU head Charles Reed brings experience squeezing funds from the Legislature and favoring race preferences.

RICHARD FERRIER

THERE'S MORE folly and fraud to report from the trenches of academe. Recall William Hauck, the gentleman *California Journal* editor A.G. Block unearthed ("Correspondence," *CPR,* November/December 1997) as someone associated with the *Journal* who had at least "worked for a Republican" to prove the magazine's *bona fides* as a non-partisan publication. It turns out that Mr. Hauck is next in line to chair the CSU trustees. Hauck, who was connected to the *Journal,* was indeed appointed to the CSU board by Governor Wilson, in whose administration he served. For those who don't remember, Hauck was also chief of staff to two speakers of the Assembly, Bob Moretti, and — trumpets please — Willie Brown. According to the *Sacramento Bee,* Hauck is a registered Democrat. That's "balance" at *California Journal.*

Which brings us to the successor to departing CSU Chancellor Barry "Bonds" Munitz. The trustees in their wisdom have chosen Charles Reed, formerly head of the Florida State University system and former chief of staff to Democrat Governor and Senator Bob Graham. Reed, an administrator with an Ed.D., has declared he will emphasize work force training and technology. Reports from Florida paint him as accomplished in squeezing funds from the Legislature and a big supporter of race preferences. Some Florida observers say he left because he did not want to work under a Republican Legislature and, as seems likely, a new GOP governor, Jeb Bush, who is heavily favored to win the office this fall. Reed recently established a new campus of the Florida system that features "corporate/university partnership," few residential students, and an orientation field trip to a Seminole burial ground to give the students, at the other end of their computer terminals, 'a sense of place,' in other words, Monterey Bay on the Gulf Coast.

Reed's first strategic decisions will include whether and how to proceed on the CSU Channel Islands project. CSU CI is still not the 23rd campus in the system, though to hear acting President J. Handel Evans talk you'd think it was. The trustees voted in September to acquire the Camarillo State Hospital property and to budget $6.5 million to enable its use by a CSU Northridge extension now housed in rented property in Ventura. The next move came in the governor's budget. He asked for nearly $17 million for the project, a figure that will almost certainly delight the Democrat-controlled Legislature, which never met a tax subsidized university it didn't like. (Think about that, Republicans. Maybe the Dems know something about the political effects of Cal State campuses in their districts.) Unless local environmental objections prevail, an unlikely but possible event, the CSU Northridge extension will move to the new site, probably taking its first students in 1999. This January, the Ventura County Board of Supervisors approved a 20-year tax-free arrangement for the corporate players who will share the property with the CSU, and signed off on a "special authority" which, if approved by the Legislature, will give CSU oversight, *unaccountable* to the voters, to develop the property.

CSUN HAS already chosen an academic planner, Dr. Steven Lefevre from the University of Texas at Tyler, to set up the program at Camarillo. Lefevre is an interesting choice, given the local political situation. It turns out that Evans and Company have played bait and switch with the Ventura Community College District and its conservative chancellor, Philip Westin. When Evans wanted Westin's support for CSU's taking the hospital grounds, there was a much ballyhooed "memorandum of understanding" that gave Westin's three junior colleges a large role in the plans for CSU CI. The JCs would conduct all the remedial and nearly all the lower division courses, and Westin, a traditional educator with a real academic degree (in Music) would probably have seen to it that his schools did a good job.

After the trustees gave their approval to the land grab, Evans and Company began to give Westin the cold shoulder. Now Evans can consult with the newly

Richard Ferrier, a member of the Thomas Aquinas College faculty, is CPR's *Higher Education correspondent.*

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THE FRONT LINE

A Cross Too High?

Denis J. Norrington

Last November's election produced a small if unnoticed victory, one suggesting new avenues of approach for those fighting what has been mostly a losing battle. Attacks on religious symbols by so-called "separation of church and state" advocates are rarely tested at the ballot box — and even more rarely in San Francisco — but it happened last year.

Sitting atop San Francisco's highest point, 967-foot Mt. Davidson, is what was, until recently, the largest cross in North America. The 107-foot symbol was completed in 1934. Dedicated by FDR, the cross was first lit by the president pressing a button 3,000 miles away in Washington, an arrangement largely the brainchild of James Decatur, the head of Western Union and a major proponent of the cross project. It is also widely believed the cross was built to honor Americans killed in World War I.

The idea of a cross atop a high point of the city named after St. Francis of Assisi goes back to its Spanish founders. Padre Francisco Palou had a cross constructed on Point Lobos at the southern entrance to the Golden Gate in 1775.

The first interfaith Easter sunrise service was held in 1922 at the site of the current cross. In the 192Os, at least three wooden crosses preceded the current steel-reinforced, concrete structure. All three were burned to the ground, showing that the current era has no monopoly on anti-religious bigotry. The current structure itself towers over the eucalyptus forests that share Mt. Davidson with the homes of one of the city's three highest-income residential areas. On a fog-free day, the cross can be seen from almost half the city and is readily visible to ships in the Golden Gate and to air traffic above San Francisco Airport. Many San Franciscans, myself included, have lived their lives in the shadow of the cross.

After the dedication, it was arranged to have the cross lighted during both the Christmas season and the six weeks of Lent through Easter. Since it was built on city land, although paid for largely by private donations, the city undertook the lighting arrangements. During the '70s and '80s, the lighting fixtures and the cross itself fell increasingly into disrepair.

Given the cross's high visual prominence and its location on city land, it was only a matter of time before secular humanists, allied with "liberal" religious groups, went after it. They began with a 1990 lawsuit filed by (who else?) the ACLU, on behalf of 10 plaintiffs. Although U.S. District Judge John Vukasin denied plaintiffs' request for immediate removal of the cross in 1992, its opponents pressed on, buoyed by a 1993 appellate court ruling against San Diego in a parallel case.

In August 1996, a three-judge panel ruled against San Francisco and for the plaintiffs, stating that the cross violated the "no-preference clause of the Constitution." A quick re-reading of the First Amendment shows that the word "preference" appears in it *nowhere.* It is a prohibition against Congress interfering with "the free exercise" of religion, which is why liberal judges rarely quote the First Amendment directly.

Stung by the appellate court's decision, San Franciscans rapidly organized to save the 62-year-old symbol. Suddenly, San

(Please turn to page 31)

Denis Norrington is a 50-year resident, native-born San Franciscan.

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arrived Lefevre, who, it turns out, was in the thick of a similar fight in Texas, where his UT campus was last year in the process of wresting control of the lower division courses from a community college, against fairly strong local resistance. All in all, a nice piece of political footwork by Evans, whose chief talents appear to be political and media management.

BUT NONE of this means there will be a CSU CI with Evans or anyone else as president. That will require another decision of the trustees and additional budgeting and legislation. Meanwhile the trustees have prudently kept open the possibility of getting out of the Cam State site. Chief among their reasons for caution is the thought that the work force training curriculum of the future CSU may well be cheaper to deliver off-site *via* technology. Local residents still don't have a written mission statement or curricular outline for the proposed new campus, but Evans' latest pronouncement, that the new national agenda is "the global marketplace," gives a clear enough indication it won't be liberal education. Trade and Technology are the new shibboleths of the CSU, and that takes us to the latest story out of CSU H.Q. in Long Beach where the CSU brass is fighting Democrat legislators, with Republicans displaying an interesting silence.

CETI is the name to watch in the latest phase of the CSU's plans. The acronym stands for the "California Education Technology Initiative," a scheme to get $300 million worth of wiring and equipment from a consortium of high tech companies and much ballyhooed as a plan to bring the CSU "into the 21st Century." The corporate partners — GTE, Microsoft, Hughes, and Fujitsu — get a corner on the market to peddle their wares to faculty, staff, and students, and will have a privileged position to recruit workers and influence curriculum. CSU gets the free hardware and software. Negotiations were proceeding in secrecy and with dispatch when a number of whistle blowers, including CCRI co-author Glynn Custred and Bill Gates' nemesis, NetAction, started to raise questions of corporate influence and monopoly practices. A legislative request to the legislative counsel produced an advisory opinion that the arrangement was unconstitution-

WHAT YOU HAVEN'T BEEN TOLD ABOUT GUN CONTROL

By WILLIAM E. SARACINO

Inspired by the even more than usually ill-informed, not to say hysterical, debates on repealing the Second Amendment that characterized last year's legislative session, this new regular feature adopts the novel approach of considering Facts about guns, gun control, and gun owners.

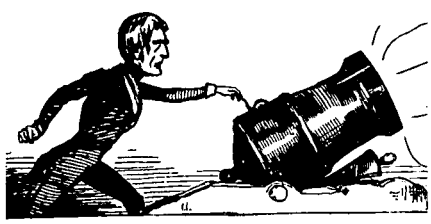
The women's issue: the right to self-defense.

Pitching to those vapid "soccer moms" who don't care if Bill Clinton *is* a sleezebag as long as they can afford to drive a new Volvo, Sacramento's anti-Second Amendment forces are attempting to package gun control as a generic "women's issue." They think it will give them a new club with which to pummel Republicans in November.

William E. Saracino is executive director of Gunowners of California.

That's to be expected. What's not is the sad sight of GOP campaign "professionals," folks who should know better, singing the same tune. We advise these GOP "experts" to consider the following facts before conceding this basic constitutional issue to the Democrats: These statistics, for 1993, are the latest available:

• Law abiding citizens used guns to defends themselves against criminals about 2.5 millions times. Of these 2.5 million self-defense cases, more than 200,000 involved women defending themselves against sexual abuse.



• In *90 percent* of violent crimes against women, the offender did *not* have a gun. In 75 percent of the cases where a woman successfully resisted a violent crime, the woman *did* have a gun.

• Perhaps this is why more than 17 million women own guns.

• Citizens shoot and kill at least twice as many criminals as police do every year (1,527 to 606). About 2 percent of these "civilian" shootings involved an innocent person mistaken for a criminal. The rate at which this sort of error occurs in police-involved shootings is *11 percent* — more than 5 times as high.

Society as a whole and women in particular are safer when law abiding citizens are free to own guns and encouraged to defend themselves. CPR

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LEGISLATIVE FILE

As the year's legislative agenda takes shape, herewith summaries of some early bills and proposals:

Taxes: Governor Pete Wilson dropped the tax cut he proposed in past years, but Senate Republican Leader Rob Hurtt recommended reducing personal income taxes. Hurtt pointed out that personal income, which has increased 20 percent during the past four years, has been outstripped by tax liability increases averaging 35 percent.

Senator Ray Haynes and Assemblyman Tom McClintock proposed eliminating the $3.3 billion in vehicle license fees paid each year by California motorists. McClintock predicted per-family savings of $240 under his plan to faze out the fees over the next five fiscal years. The proposal was endorsed by National Tax Limitation Committee head Lewis Uhler who predicted the measure will gather popular support.

Health: The governor's HMO task force recommended more than 100 proposals including mandating fixed benefits and fixed practices on providers. USC Professor of health care finance Glenn Melnick criticized the recommendations as stifling competition that lowers "costs by forcing health care organizations to find new and innovative ways to deliver care" while "mandates substitute the government [for] consumers and health professionals in deciding what kinds of health services are available to them and, ultimately, what services cost."

Bilingual education: S.B. 6 by Democrat Sen. Dede Alpert and Republican Assemblyman Brooks Firestone would give

local school boards power to overrule parents and force children into the state's mostly Spanish-immersion "bilingual education" system. The bill was proposed as an alternative to the June ballot "English for the Children" Prop. 227 that would let parents choose English-language education for their children.

Prison reform: Citing 1998 Little Hoover Commission and Legislative Analyst studies showing California parolee recidivism at 62 percent in fiscal year 1996-97 (more than six times 1980's 10 percent rate) legislators held hearings to begin fashioning a "Public Safety and Community Reintegration Act" for introduction possibly later this year. Hoover recommended moving corrections policy away from mass incarceration of non-violent as well as violent offenders toward reserving prison for those posing a violent threat.

Lawmakers are studying recent North Carolina reforms credited with reducing prison overcrowding and lowering recidivism. Punishment of non-violent offenders is geared to encouraging them to hold jobs, pay victims restitution, and build healthy family, social, and spiritual ties in their communities under strict supervision. The hearings, which included testimony by former GOP Assembly Leader Pat Nolan, were conducted by Senate Public Safety Committee Chairman John Vasconcellos.

Old Business: Governor Pete Wilson vetoed a bill requiring health insurers to offer prescription contraceptives after its Democrat author refused to include a "conscience clause" exempting employers opposed to the requirement on religious grounds. Uninsured drivers cannot sue for pain and suffering following a state Supreme Court ruling allowing Proposition 213 to take effect statewide. A trial lawyers' effort to "de-publish" the ruling failed. It can now be cited by other courts and lawyers as precedent. CPR

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al, and nearly half of CSU faculty senates passed resolutions calling for a slow-down of the ratification by the trustees and ending the secrecy. The *LA Times* and other media took up the story, particularly after students demonstrated at Humbolt State and other CSU campuses. It all came to a head in a January 6 Sacramento legislative hearing where nearly all the testimony was anti-CETI. The four corporate partners did not even show up, leaving CSU vice-chancellor for Finance, Richard West, to take the heat. One of the standard moves in an insider deal like CETI is to have phony consultation and networking with what at CSU are called "stakeholders" (meaning the special interests involved) and then present the finished scheme as though it were the result of an open process. When the CSU brass made this move at this hearing, the irascible John Vasconcellos nailed them: "Did those stakeholders include the Legislature?" Vasco growled. "I've never heard of this!" Other Democrats raised the constitutional question and concerns about obsolescence of the equipment. The next day the ineffable Barry Munitz came down from Mt. Getty to give an interview to the *LA Times.* Munitz, who once gave Bill Clinton his watch as a gift when the president admired its large dial and numerals, imitated the MO of his friend Bill: The people against CETI were, he said, "obstructionists" and "unimaginative." But he failed to persuade the *Times* which, next day, editorialized: "the university cannot ignore worries that this very costly deal is unbalanced in favor of the private companies. The only way to tell is to open up the process." The trustees heard at least this much of the message. The deal, which they had planned to ratify in January, will now be held off until May at least. They did, however, adopt for CSU a general design known as "Cornerstones": a social activist, voc/tech, worker retraining plan for the university. To see what it is all about (basically a Goals 2000 for higher education) look up the critique at www.inow.com/~mukesh/NOGOALS2000.htm on the web.

Republican legislators played almost no part in these hearings. Sources say they are clueless about liberal education and actually *want* the corporate sector to infiltrate CSU as a counterweight to "diversity" and to the system's leftish politics generally. Arguments that GTE and similar high-tech corporations practice corporate socialism and "diversity" human resources policies with the best of them fall on deaf ears. It is cheaper to make partnerships with favored corporations than to pay the true cost of subsidized public universities.

BUT MAYBE the GOP legislators have a point. Recently all the big higher education lobbies in D.C., whose coffers are filled in part by dues from California public colleges and universities, placed paid ads in the *Chronicle of Higher Education* and the *Washington Post* calling for race preferences in university hiring and admissions. Will the governor, trustees, and regents take notice of this abuse of public funds, lobbying for policies contrary to the California Constitution, now that CCRI is law? Don't count on it. They did nothing in October 1996, when a similar consortium of colleges spent $84,000 on full page ads in the *LA Times* and three other California papers attacking 209. Besides, the GOP legislators in Ventura County, notably the feckless Brooks Firestone, but the others as well, haven't peeped about CSU Channel Islands.

THE LAW

The Judicial Confirmation Mess

Ideological Chickens Come Home to Roost

GIDEON KANNER

CHIEF JUSTICE William H. Rehnquist's 1997 report on the federal judiciary stimulated another flurry of liberal demands that the Senate forthwith approve President Clinton's federal judicial nominees and fill the scores of vacant federal court judgeships. Though Rehnquist blamed Clinton for failing to nominate sufficient numbers of judges to fill the existing 80 vacancies, he was also critical of the Senate's failure to act promptly on the nominations that Clinton did make. The latter part of Rehnquist's remarks has been promptly seized on by the press as evidence of Republican Senators' culpabil-

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ity in politicizing the courts. Within days of Rehnquist's report, the *Los Angeles Times* and the Associated Press had it that Rehnquist "blamed the Senate for 'serious delays in the appointment process,'" ignoring Rehnquist's comments on Clinton's failings. But in fact, the present situation is hardly news; it is no different from what it was in 1992 when George Bush departed the White House, leaving behind some 100 vacant federal judgeships that the Senate, then controlled by the Democrats, had failed to act on.

Unsurprisingly, the 1992 Senate failure to confirm scores of pending judicial nominations made by President Bush evoked no handwringing from the liberal elites. On the contrary, during the Bush administration a coterie of liberal law professors at the University of Southern California law school ginned up a convenient constitutional theory that envisioned the Senate's "advise and consent" prerogative as a source of a constitutional power to control not just confirmation but also the selection of judicial candidates. USC law professor Erwin Chemerinsky wrote in 1992 that the Senate should eschew its traditional role of merely consenting to presidential nominations, and should become proactive in the selection of federal judicial nominees. His colleague, Professor Dennis E. Curtis, went Chemerinsky one better and called on the Senate to reject even highly qualified judicial nominees if they did not fit in with Democrat Senators' vision of a federal judiciary. USC law school Dean Scott Bice called for what he called a meaningful Senate role in selecting judicial candidates "based on a preference for sharing and dividing power over significant decisions that have a long term effect on fundamental matters."

But now that Republicans control the Senate and the ideological shoe is on the other foot, we don't hear much from the groves of academe about those expansive senatorial prerogatives. Now, when it comes to judicial appointments, the president is looked upon as the Big Kahuna, and the Senate, we are told, should just get with the program and cooperate. That vision of federal judge-making has also been the stuff of front-page stories in the *New York Times* and editorial fulminations in the *Los Angeles Times* which professed to be shocked — shocked! — that there is partisanship going on in the U.S. Senate.

But while the problem caused by persistence of those judicial vacancies may be real, its root causes have not received the public attention they deserve. The mainstream liberal press, evidently hoping that public memory is short, has been trying to depict this situation as a partisan conservative conspiracy to deny President Clinton the prerogative of his office in appointing federal judges. In contrast, Clinton is depicted as only trying to appoint "moderate" jurists, yet being frustrated by those partisan Senate Republicans. In fact, what we are witnessing is a natural evolution of a trend started by the Democrats more than a half-century ago, and a case of just deserts.

THE SEEDS of the problem were planted in the 1930s when President Franklin Delano Roosevelt unveiled his infamous court packing scheme to force the Supreme Court to accede to New Deal legislation, and made an offer the Supreme Court could not refuse. Quit subjecting New Deal legislation to strict constitutional scrutiny, went FDR's threat, or I will call for a constitutional amendment to add more justices to the Supreme Court, and will pick new appointees favorably predisposed to New Deal ideals. It never came to that. In the infamous "switch in time that saved nine," the Justices were born again and suddenly found New Deal legislation to be consistent with the Constitution. In the process they relegated economic liberties to the status of a constitutional poor relation, where, by and large, they still languish. And so, the notion of an ideologically compliant judiciary what legitimized with a bang. Enter the "Warren Court."

It was not only the activist changes in the law, but the Warren style of judging, that contributed to the present problem. When Chief Justice Earl Warren, as was his wont, would interrupt a lawyer's closely reasoned argument of law, and ask his famous question "Yes, but is it fair?" he changed the vision of American judicial decision-making, and ultimately, the making of American judges. The wide adulation that Warren's style and judging received from the liberal elites (and that is still taught in law schools as the very model of enlightened judging) institutionalized that change. The problem was not Warren's preoccupation with fairness; after all, who can be opposed to courts being fair? Rather, as adherence to legal doctrine began losing its importance and courts moved deeper into ideology it became obvious that "fairness" is a highly malleable concept.

It is one thing to say that concepts of fairness that are agreed upon as moral norms of society should inform evolving legal doctrine. It is quite another to prefer the arguments of one side to litigation, and trump the other side's vital interests on the grounds that doing so is only "fair." To state the obvious, what is fair to a William Brennan may not seem fair at all to an

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Antonin Scalia, and *vice versa.*

Eventually, the notion emerged, first as subtext and later explicitly, that to be liberal is to be "fair" and to be conservative is to be "mean spirited." Such simplistic rhetoric may be tolerable in the political arena, but it becomes destructive when it seeps into legal discourse because instead of facilitating the balancing of the litigants' legitimate competing interest, it tends to delegitimize the position of one of them. This can be true not just in cases implicating important government policies, but in virtually any dispute.

An excellent example is provided by the ongoing high profile brouhaha between TV actress Hunter Tylo and her employers. Tylo's complaint was that her employers breached her contract by firing her when she became pregnant. Their contention what that the contract gave them control over her appearance, and that they were within their rights to act on their judgment that a pregnant woman was temporarily unsuitable for the role of a seductive, bikini-clad vixen in a soap opera. Maybe on the particular facts of her uncommon physique Tylo (who had managed to camouflage her pregnancy for several months) had an arguable if tenuous contractual point. Maybe not. But by the time the legal system finished with that pedestrian contractual controversy, Tylo became a martyr striking a blow for fairness to gravid femininity, and as such entitled to millions of dollars in punitive damages (much more than what she asked for) on the grounds that she had been unfairly treated. In a letter to the *Los Angeles Times,* her lawyer asserted that Tylo's multi-million dollar verdict was a vindication of women's rights against "big corporations." Tylo's employer's perfectly reasonable argument was thus pronounced not merely wrong, but illegitimate and deserving of punishment. After all, fair's fair.

YET ANOTHER theory was unleashed on the legal world during the Warren era. The legislatures, went this theory, had been simply screwing up by failing to change statutory law to keep pace with changed social conditions. It was thus up to fair-minded judges, went the argument, to step in, do the inept legislatures' job for them, and overhaul not only the law, but through law, society itself. That this was a candidly espoused and anti-democratic notion that at its core violated the constitutional doctrine of separation of powers as well went without much mention. It was an idea, were were told, whose time had come. People were bringing their disputes to courts, went the argument, and judges could not just turn them away. They had to decide the cases thrust upon them fairly, they argued, even if that meant delving into social problems that legislatures, in the exercise of their political judgment, thought unnecessary or too divisive to address by law. From now on, the *ad hoc* making of social policy would be all in a judicial day's work.

But ideas do have consequences and one of those consequences was a radical transformation of the role of judges. From now on, judges would no longer aspire to being merely impartial arbiters of legal disputes, occasionally revising rules in the common law tradition as changed social conditions required. Rather, the brave new judges would now make those social changes themselves; they would become movers and shakers and public policy makers. In the enthusiasm surrounding these newly-minted notions of judicial power to transform society, not much thought was given to the fact that there is usually little in the backgrounds of judges to qualify them for such decision making.

In other words, lawyers' high degree of forensic skills and their conspicuous ability to parse rules of law may rightly bring them professional recognition, and eventually an appointment to the bench where such skills enhance a judge's craft. But such lawyerly talents hardly qualify their possessors to have the last say on a variety of personal, social, and moral problems on which the nearest truck driver may be as well qualified to voice an opinion as the nearest judge.

Old lawyers who have been around judges for a while know that the concept of black-robed philosopher-kings who, like the fictional father of yore, know best what is good for society, is a myth. In reality judicial "kings" can be none too philosophical, and judicial "philosophers" none too (intellectually) regal. Moreover, these days more and more judges, particularly at the state court level, are appointed to the bench after careers as successful government bureaucrats. Their backgrounds may thus make them competent technicians, but hardly knowledgeable in the ways of the private sector, and certainly no worse than any other group in matters of, say, education, gender relations, or family cohesion. In California, for example, things have reached such a state that a deputy attorney general named Richard M. Frank has written an article, tellingly entitled "The California Supreme Court — A Tribunal of Public Lawyers," gloating that counsel for public bodies can now take comfort from the fact that all seven current California Supreme Court justices are former government lawyers.

The vision of judges as shapers of society reached its

(Please turn to page 31)

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Doghouses, Outhouses, and Brightening the Corner

We must be very proper in providing for the poor.

WILLIAM R. ALLEN

WE HAVE a problem of homelessness. We must have, for in December 1997, announcements were made of two expanded federal programs, the increases totaling more than $2 billion, to help the homeless.

No one knows — even if some have pretended to know and wish to exaggerate — the number of those without personal housing. One can wonder why the problem purportedly has intensified during an uncommonly prolonged period of general economic expansion. And one can suspect that, even with generous public programs of aid, there will remain a considerable hard core of people sleeping on the streets and in the parks. Evidently, many of them are gravely handicapped mentally, emotionally, or physically. And if they play their cards just right, they may be interviewed on the 6 o'clock news and even lecture at Harvard.

But how does one help those — few though they may be — who can be effectively helped? One Jerry Baros thought a few years ago that it would be useful to provide shelter to some who lack shelter. He tried to do so in two cities, one in New Mexico, the other in California. A few in the group he tried to aid thanked him; the governor of one of the states formally commended him. But the community in general, including the homeless and the Salvation Army, derided and vilified him.

The tactic of Mr. Baros was widely deemed uncouth. Mr. Baros, you see, runs a doghouse business. So he modified his houses for temporary human habitation. In one version, according to *The Los Angeles Times,* he lengthened his standard doghouse, added insulation, put in carpeting, and built two small windows and a door with a lock. In an alternative design, the structure is eight feet tall: it looks less like a doghouse but more like an outhouse.

Neither a doghouse nor an outhouse was deemed a preferred substitute for a good ol' cardboard box — or for no protection at all. We must be very proper in providing for the poor. One city official called such accommodations "dehumanizing, degrading, and disgusting." He might have added, Mr. Baros suggests, that they are also embarrassing to the city by drawing attention to the inadequate programs of sheltering the homeless.

As with all policies, there are questions not only of what to do, but also of how to do it and what not to do. With the problem of homelessness, we are basically to supplement short-term aid with promotion of long-term avenues toward greater economic productivity of the poor. Meanwhile, housing capacity would be increased by getting rid of supply-reducing rent control — and possibly by augmenting supply-increasing demand with rent vouchers.

BUILDING INDIVIDUAL small shelters is only a quick and partial alleviation of misery, making hardship a bit less hard. But so far as it goes, it would seem to help rather than hurt. And for most of us, lacking authority and resources for grand projects and fundamental reforms, the best we can do is to brighten the corner where we are. CPR

William R. Allen, a pure-hearted economist at UCLA, joins Li'l Abner in finding the world often more confusing than amusing.

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THE WORKING PRESS

Tax-funded training-ground for the left

Why do conservatives help subsidize sequestering the young, for much of early adulthood, in academe's pernicious political atmosphere?

TIM W. FERGUSON

THE GREAT unchallenged capitulation to bigger government in California in the last year is the abandonment of efforts to charge something closer to a "market price" for public higher education. Steady progress toward a realistic tuition (or whatever it's called) at the UC and state "university" systems has been interrupted by the clamoring of Republicans as well as Democrats. The still-low rates are a subsidy for the middle class, primarily, and those are the hardest ones to cut. Tony Blair seems to be doing a better job of challenging these handouts than is your nearby suburban conservative.

Implicit in the bipartisan campaign for registration giveaways is a belief in near-universal matriculation to four-year schools. California might do better to focus on the K-12 classrooms, which are dumping into the colleges such shocking numbers of enrollees needing remedial instruction. (That's one big reason to question the mass access to Cal State.) Beyond that, however, is the general question of who is suited for a university environment (read Allan Bloom on that) and, even more of a concern, what is the effect on the politics and culture of a society from having huge numbers sequestered in academe, with all of its pernicious political influences, for much of their early adulthood. You won't see this raised in the press, but you will in Paul Johnson's epic history, *Modern Times* (which ought to be on the bookshelf of every conservative or libertarian).

Meantime, it helps just to look at the numbers, which the *Los Angeles Times* with misdirected intent allowed its readers to do in a recent table. The paper wanted to show how "costs are rising," but the cold hard fact is that Californians still make higher-ed a bargain. The average resident tuition here for this academic year is $2,826. The national average is $3,111, even though the costs of providing the campuses and faculty is surely lower in most other places. The *Times* also showed the range in total fees (including room and board) at the state's four-year schools, and it's wide: from slightly more than $6,000 a year at Cal State San Bernardino to more than $12,000 at UC Berkeley. Plus, of course, many students can live at home. So the hardship factor is relative, in a lot of respects.

Before we expand the systems further, it would be helpful to hear or read more of a debate on pricing and enrollment at the state's four-year schools. Anyone?

♣ ♣ ♣

Tom Bethell of *The American Spectator* came up with the Strange New Respect award for Washington conservatives who "grow" in office and begin to win admiring notices from the Beltway establishment press. Curt Pringle hasn't quite reached that stage but it's clear the onetime bad boy from Orange County has grown comfortable in the state capital. His speakership was cut short by the disastrous 1996 election results, but not before a few neutral observers acknowledged his adroit use of power. When the term-limits bell finally tolled, Pringle naturally went looking for a seat to keep warm. He was figured for controller, a potentially useful job for somebody with the taxpayers' interests at heart. But at the last minute — after incumbent Kathleen Connell soured on a race for governor — Pringle instead opted for the open post of treasurer. Only the lieutenant governorship is an emptier vessel for hanging around town and collecting campaign cash. (Credit Jan Goldsmith with the same — *er* — lofty ambition.) Pringle's shift nearly aced out Ruben Barrales, a rising San Mateo pol who at least brings an Hispanic surname to the lilyish GOP slate. Barrales had to be cajoled instead into what will probably be a losing battle against Connell. Pringle, meanwhile, was playing kingmaker in the Capps congressional race, lining the Republican hierarchy up for his pal Brooks Firestone. But

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this wasn't Orange County, where the party machine calls the shots, and conservative Tom Bordonaro's small-arms fire sent down the anointed Firestone in flames.

In all of this, Pringle hasn't acted much differently from the run of the mill statehouse sort — but that's the point. Yet aside from a riff in this magazine's past issue, hardly anyone has asked what became of the old Curt. Even the *Orange County Register's* anti-establishment editorial page, which scolds opportunistic career politicians, held its tongue. The left, aside from periodically reminding Pringle about the citizenship-screening guards his campaign posted in a heavily Hispanic voting precinct long ago, has other fish to fry. So the consternation among GOP rightists goes unreported.

⚜ ⚜ ⚜

When Dianne Feinstein opted out of the governor's race, the *Register* published an editorial based on an interview with whom? A radical libertarian? An operative of the Irvine Co.? Curt Pringle? No: with Sherry Bebitch Jeffe, the mouthpiece of the Sacramento mainstream. A curious lodestar for the flagship Freedom newspaper. Has fluoride gotten into the Orange County water?

⚜ ⚜ ⚜

These columns are written several weeks before you normally see them, and in the meantime the ground may shift. Certainly Pete Wilson's latest bent is not in tune with the streak of conservatism noted here last time. The biggest disappointment in his State of the State message was the disappearance of the tax cut he'd championed for a few years. That may be evidence he's still a "moderate" politician — such folks advocate cutting tax rates only when it's needed to spur the cyclical economy. Once conditions improve, they forget about tax cuts because, deep down, they have no guiding wish to shrink the relative size of government. Alas, that may still describe Pete. Nonetheless, as stated last time, it would be great to get better Sacramento reporting about the governor's private comments and counsel — whichever direction he may be headed in at the moment.

⚜ ⚜ ⚜

Where have all the liberals gone? Could that one day be the sad (for some) refrain sung of the *Los Angeles Times's* roster of staff pundits? First there was Robin Abcarian, departed from the "Life & Style" section to pursue her feminism in other media. Then Ronald Brownstein, the ex-Naderite turned political-analysis bigfoot, decamped for *U.S. News & World Report.* Now Peter King has bid *adieu* to a twice weekly perch on the California news page in favor of a more fulltime gig at the *Bee* papers. (Seeing as how King likes to hark back to his Fresno roots in the course of his Democrat sermons, it's a natural fit.) What comes next? Mike Downey from the sports department is moving over to news, and who knows what that portends. Sometimes the toy shop's talking heads can deliver a punch. Downey had the nerve to challenge the disability of the pro golfer who wanted a cart, so he has the ability to be contrary. The latest shift leaves the *Times* with George Skelton and Bill Boyarsky, who are reporters first and commentators second, environmentalist Robert Jones, reduced to once a week, and a generally apolitical crew of columnists beyond that. Geez ... all we asked for was something right of center to balance things out. Instead, it's beginning to seem like the other side is being winnowed out.

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But there's still plenty in the *Times* you'd recognize. The "Washington Insight" column inside the "A" section is a collection of digs — usually at conservatives — credited only to "The *Times* Washington Bureau," which of course is headed by the notorious Jack Nelson. And the soft sections remain full of political and social cant, such as a recent feature by Josh Getlin headlined as follows: "In the Cult Hit 'The Vagina Monologues,' a Playwright Boldly Explores a Subject That Most Women (and Men) Don't Like to Talk About." Turns out that Eve Ensler, who is both an "author" and an "activist" (surprise!), has had no trouble enticing a dozen prominent fems to perform her *avant garde* work in New York. The fact of the matter is that city girls of the '90s like nothing better than dwelling on their bodies. (And Josh, hate to break it to you, but that part of the anatomy is about the only thing some men talk about. What was it Vernon Jordan said he and Bill spent their golf dates discussing?)

⚜ ⚜ ⚜

Credit the *Times'* Boyarsky for an early column on how Al Checchi has made serious inroads into the Hispanic left's political hierarchy. (He didn't say "left.") Assembly Speaker Antonio Villaraigosa's backing — along with that of Bob Hertzberg of the San Fernando Valley (aptly spotlighted by Boyarsky as a *de facto* part of this power structure) — should leave little doubt as to what a Governor Checchi would really mean. But surely that won't spare us endless press references to the "businessman Democrat" and his nonpartisan agenda. CPR

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Say it ain't so, Duke

Twenty years ago, George Deukmejian blasted judges for doing the same thing he is now apparently willing to overlook. He had it right the first time.

by Mark S. Pulliam

Editor's note: The notion making the rounds in Republican circles about Chief Justice Ron George is that even though he was plainly wrong, as to both law and policy, in his American Academy of Pediatrics v. Lungren opinion for the Court (which nullified parents rights to raise their own children when the issue is abortion), he has otherwise served as an exemplary judge, applying, not making, the law, and refusing to take sides in the pitched political and ideological battles that are properly the domain of the elected branches of government. He should not, the reasoning concludes, be judged on the basis of one bad decision. But how, this argument invites us to wonder, is it possible for a model Republican judge with years of devotion to serving the law as a foundation to go so completely off the rails as he did in Lungren, and then somehow further to right himself and return to judicial propriety? Recall, this is not Ron George's version of events. He is proud of his Lungren opinion, which he went to extraordinary lengths to force on the state and which he quite publicly crowed about afterwards. He "would not be intimidated," remember? In any event, it is true that one opinion is too little to go by, at least when there is plenty more to consider. CPR Legal Issues correspondent Mark Pulliam and, in a companion article, Gideon Kanner examine other parts of the record below. What they find involves more than just the chief justice, since for many years the Supreme Court has been dominated by Republican appointees. It addresses the question of George's Republican, conservative credentials, and of those of this Court, in the proper context: not according to who appointed these justices or what their party registration may be, but asking whether their actions reflected or trampled upon Republican principles.

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On January 22, 1998, the Committee to Retain Chief Justice Ronald M. George, formed to organize support for his retention in the November 1998 election, released a press statement announcing that former Governor George Deukmejian will serve as the committee's honorary chairman. The press release quoted Deukmejian as stating that George "has achieved an outstanding

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record of public service for the past 32 years. He has provided effective judicial leadership. I'm honored to help him and believe very strongly that he should be retained." This endorsement is ironic for several reasons. First, Deukmejian is a long-time abortion opponent, and the organized opposition to George comes from prolife groups angered by his decision last year striking down California's parental consent law.

Second, Deukmejian is a conservative Republican who generally appointed conservative justices to the court. It was the retirement of two Deukmejian appointees — Chief Justice Malcolm Lucas and Associate Justice Armand Arabian — that permitted George (whom Pete Wilson appointed to the Supreme Court and promoted to chief justice) to engineer the "rehearing" and ultimate reversal of *American Academy of Pediatrics v. Lungren.* That is, George danced on the grave of two departing justices selected by Deukmejian. Despite this unprecedented insult, for reasons that elude many of his admirers, Deukmejian is fighting aggressively for George's retention.

The third irony is that Deukmejian led the successful campaign against Rose Bird and two of her activist colleagues in 1986. Thus, Deukmejian's imprimatur of George is viewed as insulating George from conservative critics of his record on the Court. Deukmejian brings a deserved degree of credibility to Ron George's side of the retention controversy, and neither *CPR* nor this author wish to take a position regarding whether or not any justice should be retained. But there is more than added credibility to this emphatic endorsement by Deukmejian, a Republican best known for his leadership in the fight for the core Republican ideal that judges should apply laws made by others, not rewrite them to serve their own politics. Duke as Honorary Campaign Chairman inescapably implies that Ron George is a model Republican judge, a Republican standard that may be applied to measure other judges, that he is just the sort of judge voters should expect Republicans to appoint to the bench and applaud once they are there. It is with that implication that we differ. By any meaningful criteria, and certainly by the criteria Deukmejian himself used before he retired from politics, the idea of Ron George as a model Republican jurist is certainly open to question. Let's examine the evidence.

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" — opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey,* 505 U.S. 833, 851 (1992).

"What this judicial grandiloquence means, . . . nobody knows. But then hymns to radical individualism are necessarily murky and obscure. This particular one is known in the trade as 'the mystery passage'" — *Slouching Towards Gomorrah* by Robert H. Bork.

Ron George cited and quoted "the mystery passage" from *Planned Parenthood v. Casey* in his 4-3 decision in *American Academy of Pediatrics v. Lungren,* 16 Cal. 4th 307, 333 (1997), overthrowing parents' rights to raise their own children if the issue involved is abortion. As Robert Bork, perhaps the nation's shrewdest critic of judicial activism, explains in *Slouching Towards Gomorrah,* such words "mean nothing and were intended to mean nothing. They were intended, through grandiose rhetoric, to appeal to a free-floating spirit of radical autonomy. Those words illustrate the anti-intellectualism that suffuses constitutional law as a consequence of modern liberalism." And they also find a friendly home in Ron George's *Lungren* opinion, which the *California Bar Journal* called the current Court's "defining opinion." Is this now to be the mark of a model Republican judge? Defining himself through enraptured invocations of "a free-floating spirit of radical autonomy"?

In 1979, a resolute attorney general named George Deukmejian criticized the California Supreme Court in an insightful law review article entitled "All Sail and No Anchor — Judicial Review Under the California Constitution." Deukmejian specifically decried the Court's practice of relying on expansive interpretations of the state Constitution — so called "independent state grounds" — to strike down laws that would have been upheld under the U.S. Constitution. Deukmejian charged that "[t]his trend reflects our state supreme court's desire to avoid Burger Court limitations on Warren Court decisions by insulating itself from United States Supreme Court review."

One of the California Supreme Court decisions Deukmejian objected to in this 1979 article was *People v. Tenorio,* 3 Cal. 3d 89 (1970), in which the Court had used "independent state grounds" to strike down a statute that gave prosecutors sole discretion regarding what charges to bring against a criminal defendant. The statute, which prohibited possession of drugs, mandated prison sentences for second offenders. Evidently fearful that liberal judges would try to avoid ordering the mandated prison term by dismissing "prior conviction" allegations at sentencing, the Legislature *required* the prosecutor's consent before a prior-conviction charge could be dismissed. The Court in *Tenorio* ruled that this feature of the statute violated the "separation of powers" doctrine under the California Constitution by invading the province of the judiciary (even though such prosecutorial discretion is totally routine as a matter of federal constitutional law): "The judicial power is

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compromised when a judge, who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor. The judicial power must be independent, and a judge should never be required to pay for its exercise." The holding in *Tenorio* is wrong and its reasoning absurd, as Deukmejian correctly noted nearly 20 years ago, calling this "growing use of the doctrine of independent state grounds" a threat to democracy. Urging the Court to exercise restraint and to "stop substituting its political judgments for those of the legislature," in 1979 Deukmejian warned that unless the California Supreme Court "imposes these or similar constraints on its own power, Californians may find that their state constitution is all sail and no anchor."

That was in 1979, before the voters threw Justices Rose Bird, Cruz Reynoso, and Joseph Grodin off the

Tennis Anyone?

by Gideon Kanner

The late Richard F. Babcock of Chicago once observed that the courts in California have elevated government arrogance to an art form. Indeed. Take the case of Richard K. Ehrlich, a Culver City developer, who became a sort of Flying Dutchman of California law, wandering endlessly through the courts. All the guy did was build some townhouses. For that, his straightforward case has gone through one trial, three court of appeal opinions, two decisions by the California Supreme Court, and one remand by the U.S. Supreme Court. In the end, *Ehrlich v. Culver City* was remanded by the California Supreme Court, with the city ordered to start over to determine how much he should be charged for using his own land for lawful purposes replacing his former money-losing tennis club that he shut down in 1988. No, I am not making this up. Ehrlich is still mired in litigation with no end in sight.

When Ehrlich applied for a permit to put up 30 townhouses on the vacant site of his former tennis club, the city demanded $280,000 for the benefits said to be lost to the city's population when the tennis club was shut down. It wanted another $33,200 as an "in lieu art fee," land-use newspeak for demanding that a builder either pay the city to have "public art" installed or install it himself at that cost, subject to city approval. That caper was based on the city's bizarre "finding" that urbanization is counterproductive to art production, and the solution is to make developers produce "art." No, I am not making this up either.

Doesn't the notion of having to pay some sort of *baksheesh* for being permitted to wind up a money-losing private business sound crazy? Even if you buy the city's "benefits" theory, here there were none. The club was losing money, so the net "benefits" were negative. Mind you, the city had studied the problem and decided it could not afford to buy Mr. Ehrlich's club and run it without losing money.

In 1987, the U.S. Supreme Court held in *Nollan v. California Coastal Commission* that local regulators may not exact land from builders as a condition of permit issuance, absent a reasonable link, or nexus, between the burdens imposed by the private development and the mitigating effect of the exaction. If the exaction does not mitigate such effects, it is an uncompensated taking of property, or as Justice Antonin Scalia put it, "an out-and-out plan of extortion." In 1994, the Court held in *Dolan v. City of Tigard* that the burden of proving the nexus was on the government and that even when permissible, the exactions have to be roughly proportional to the burdens imposed by the private development.

And so, Ehrlich argued in the state courts that the mon-

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How California judges — including Ron George — made land ransom and art censorship legal

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In a fragmented plurality opinion that only commanded three votes (out of seven judges), plus a concurrence that also advanced other theories, the California Supreme Court upheld the city's position on remand, though it held that the $280,000 fee was too high, and ordered its recalculation.

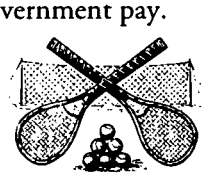
The Court seemed oblivious to the fact that it was conceptually replicating the British 1947 Town & Country Planning Act in which Prime Minister Clement Atlee's Socialist government nationalized all potential land uses in the United Kingdom, permitting only continuation of existing ones and requiring "planning permission" for any others. The *Ehrlich* rule now confers upon California cities a similar right, unless the owners first ransom their land by paying cities for loss of "community benefits" said to accrue from the operation of purely private enterprises.

And what about that "in lieu art fee"? Surely no American court would approve a citizen's conscription as a public art provider, with the government adding insult to injury by retaining the last word as to the artistic content. Right? Wrong. It too was approved, this time by a unanimous California Supreme Court, on grounds that ordering private parties to install "public art" approved by the city was no different from ordering a builder to plant grass. So much for your naive notion that artistic expression is protected speech that may not be subjected to prior restraint by the government.

Ehrlich sought review again in the U.S. Supreme Court, but without success. And so, folks, this is now the law west of the Pecos, or at least west of the Colorado River.

So who did this to us? Was it those legendary, far-out, activist, radical California judges? Not at all. It was a nominally conservative Court. Of the four justices who formed the Court's plurality, three (Armand Arabian, Malcolm Lucas, and Ronald George) were appointees of Republican governors George Deukmejian and Pete Wilson — those wonderful folks who were going to save us from liberal activist judges. The fourth judge, whose vote transformed the plurality into the Court's opinion, was old-line liberal Stanley Mosk. Only Justices Marvin Baxter and Joyce Kennard dissented on the taking issue, but even they approved the "art fee." Go figure.

The moral here seems to be that with "conservatives" like that, we don't need radicals. When it comes to takings law, it would appear, liberal judges don't believe in private property rights, and conservative judges don't believe in making the government pay. CPR



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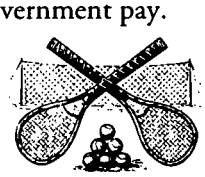

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choices may be conceded .... It does not follow, however, that having given the Court the power to dismiss, the Legislature may therefore condition its exercise upon the approval of the district attorney." In other words, the people can *completely* strip judges of sentencing discretion, but they may not condition the exercise of discretion on the consent of politically-accountable prosecutors. This display of judicial self-aggrandizement takes *Tenorio* and the subterfuge of "independent state grounds" to a new level of arrogance. Intending no slight, I say that by George Deukmejian's own criteria from 20 years ago, Ron George does not qualify as a model Republican judge.

ASIDE FROM *Tenorio/Romero,* and *American Academy of Pediatrics v. Lungren,* which even Associated Press reporter Bob Egelko acknowledges was "perhaps a step to the left of the political center," how has Ron George performed? *CPR* has reviewed parts of his record before. (*See, e.g.,* "Moderation to Excess," *CPR* March/April 1996, "The Emperors Wear No Robes," *CPR* November/December 1996, "George Watch," *CPR* March/April 1997.) I here add some additional examples:

In *Smith v. Fair Employment and Housing Commission,* 12 Cal. 4th 1143 (1996), George took sides against a devout Christian landlady in Chico who had refused to rent an apartment to an unmarried couple on the ground that she considered their lifestyle to be sinful. George agreed with the ACLU that the widow's religious beliefs were entitled to no weight, and ordered her to pay damages to the unmarried couple because her exercise of conscience constituted "discrimination on the basis of marital status."

In *Loder v. City of Glendale,* 14 Cal. 4th 846 (1997), George joined with the Court's liberals (Stanley Mosk, Joyce Kennard, and Kathryn Werdegar) to prohibit drug testing of public employees as a condition of promotion, over the dissent of conservatives Janice Brown and Marvin Baxter, and the sometimes independent-minded Ming Chin (who, unlike George, refused to join the *Romero* decision). *Loder,* like *Lungren* and *Romero,* rested on "independent state grounds." Is a pattern beginning to develop?

In *Alcarez v. Vece,* 14 Cal. 4th 1149 (1997), George wrote a decision joined by Mosk and Werdegar, to which Brown and Baxter dissented (is another pattern beginning to develop?) imposing premises liability on an apartment owner for a hazard on adjoining property that the landlord didn't even own — a broken or uncovered utility meter box on a strip of land owned by the city.

Finally, in *Stevenson v. Superior Court,* 16 Cal. 4th 880 (1997), George joined an atrocious decision by Kennard, despite the forceful and carefully-reasoned dissent of Brown, that allowed individuals to bring wrongful termination lawsuits against their former employers alleging age discrimination even though they failed to exhaust the administrative remedies *required* by the Legislature as a condition of filing suit, which were intended as a jurisdictional prerequisite.

This is the George record: a one-sided "balancing act" in which property rights, clear legislative intent, U.S. Supreme Court precedents, the interests of employers, the prerogatives of prosecutors, First Amendment religious and associational freedom rights, and the rights of parents somehow carry little weight, regularly giving way to the whims of arrogant government, judicial activism, "independent state grounds," and "a spirit of radical autonomy." In one area after another, George and his colleagues have not only failed to repeal egregious precedents established by Rose Bird and her predecessors, they have extended those precedents even further. *Romero* extended *Tenorio,* and *Lungren* extended *Committee to Defend Reproductive Rights v. Myers,* 29 Cal. 3d 252 (1981). (Reagan Supreme Court appointee Justice Frank Richardson called the key holding in *Myers* — that taxpayers are *required* to pay for abortions — a "pure invention of the majority and not constitutionally ordained".) Under George, the Court has been a ratchet moving in only one direction. George's campaign committee can issue all the press releases it wants, and recruit an obliging George Deukmejian as a personal favor, but it cannot alter the record. In 1986, U.C. Berkeley law professor Phillip E. Johnson concluded an analysis of the Bird Court's decisions by inviting "the reader to reach his or her own judgments" on the basis of the Court's record:

> For better or worse, California's Constitution gives the voters — not the "experts" — final authority over whether the present justices of the California Supreme Court should continue to exercise the vast discretionary power to make law .... An election, like a jury verdict, reflects our faith that ordinary citizens can somehow summon the wisdom to decide complex disputes that baffle and divide the experts. We permit persons with specialized knowledge to enlighten the jury, but not to usurp from it the ultimate power of decision. The verdict is yours.

And it is the prerogative of all Republicans, including but not limited to George Deukmejian, to define Republican ideals regarding judges. Is Ron George a model GOP judge? The chief justice's retention campaign, by enlisting Deukmejian at the top, has made this a central question for every Republican in California. Let the debate begin. CPR

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California's War on Abstinence

How Public Support for Teaching Sexual Abstinence Became a Mandate for Indoctrinating Kids in Value-Free Sex

The word "abstinence" has been heavily used recently, with many child development experts, education bureaucrats, and Wilson Administration officials often using the term whenever the subject of teenage pregnancies becomes hot. However, while the public front is one of alleged support for the abstinence approach to sex education, in reality all the aforementioned parties have declared war on abstinence. Even worse, public support for abstinence has been exploited by those hostile to it in such a way that non-abstinence sex education is being funded under the banner of abstinence. How did this happen? It is a long, sordid story of Machiavellian maneuvering and shady motives by both bureaucrats and the sex education industry. Add to that an effort by Wilson appointees to

BY STEVE BALDWIN

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deceive the governor and members of the Legislature, and you have quite a story.

First, some background. Sometime in the late 1980s, a nationwide abstinence movement began which produced several abstinence-based programs that showed startling success. Three such programs are Sex Respect, Teen Aid, and Best Friends. In five years of using Best Friends, a Washington, D.C., inner city school had zero pregnancies! A five-year study evaluating 26 schools using Sex Respect found a pregnancy rate of 5 percent, compared to 49 percent for girls not in the program. In a San Marcos school district, Teen Aid cut the number of pregnancies from 150 a year to 20. And a massive U.S. Department of Health and Human Services study found abstinence-based programs to be the *only* programs that reduce teen-age pregnancies. One would think schools would rush to adopt them, but in fact, war has been declared on schools using such programs, scaring away many districts. To understand the massive resistance confronting abstinence, a little history is needed.

As we now know, Kinsey's work involved coerced experimentation on young boys by child molesters.

The roots of what today cannot be fairly described as anything less than a sex education industry lie in a "movement" launched by the fraudulent work of Dr. Alfred Kinsey. Kinsey's 1948 book *Sexual Behavior in the Human Male* revolutionized how people viewed sex, especially as performed by children. Kinsey argued that children were — and wanted to be — far more sexually active than most people previously had thought, a notion that became gospel to radical humanists eager to initiate sex education at the earliest age possible.

As we now know, Kinsey's work involved coerced experimentation on young boys by child molesters. Dr. Paul Gebhard, former director of the Kinsey Institute, admitted the research included the "manual and oral" molestation of young boys. Pedophiles — Gebhard's word for them — were used to record the number and frequency of the children's "orgasms" using a stopwatch. According to Kinsey's own description of his methodology, signs of orgasm included "fighting away from the partner, sometimes with an abundance of tears." Kinsey justified this molestation of 317 children in the interest of science. He argued from this "research" that sex is good for children and that all sex, including child-adult sex, even incest, is healthy.

Now what most people don't know is how thoroughly Kinsey's "findings" dictate what our children are taught in sex education classes in public schools. In California, three major sex education groups — Planned Parenthood; the Education, Training, and Research Associates (ETR); and the Sex Information and Education Council of the United States (SIECUS) (all three either Kinsey Institute spin-offs or deeply influenced by Kinsey) — produce most California public school sex education curricula. For instance, even though ETR literature openly promotes value-free sex, since 1993 this group has received millions of dollars in grants from two California state agencies, the Department of Health Services (DHS) and the Office of Family Planning. In addition, up and down the state, public school sex ed classes employ Kinsey-based curricula developed by these three groups.

The former director of Planned Parenthood, Allan Guttmacher, a colleague and close friend of Kinsey, was instrumental in developing Planned Parenthood's Kinseyesque sex education curricula. For example, a 1974 Planned Parenthood sex education booklet, "You've Changed the Combination," endorses prostitution: "Do you want a warm body? Buy one. That's right. There are women who have freely chosen that business, buy one ... Do you want a virgin to marry? Buy one. There are girls in that business too. Marriage is the price you'll pay, and you'll get the virgin. Very temporarily."

Planned Parenthood bowed out of producing sex education curricula in the early 1980s, but a group of employees from the Santa Cruz Planned Parenthood office formed ETR, now led by Pamela Wilson. "In elementary schools," Wilson said in 1989, "we should start talking about different adult households; same sex roommates, same sex loving." Is this just some unimportant fringe-group? Hardly: ETR coordinates the "Family Life Education Network," a sex education trade association with a membership of 6,000 teachers and counselors.

In 1964, the Kinsey Institute launched the Sex Information and Education Council of the United States (SIECUS) for the specific purpose of creating sex education curricula and programs based on Kinsey's theories. Like Planned Parenthood, SIECUS received early money

CPR *education correspondent Assemblyman Steve Baldwin (A.D. 77) was Education Committee chairman in 1996.*

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from the Playboy Foundation, which knows a wise investment when it sees one, considering that SIECUS, in a position paper titled "Sexually Explicit Material," recommended pornography for children and promoted this perversion in its curriculum guidelines. Many sex education movement leaders, for that matter, including those at SIECUS, worked at *Playboy, Penthouse, Hustler* or some other part of the porn industry. From the beginning, the porn and the sex education industries have had interlocking interests and personnel, and our culture is now reaping the results of this unholy alliance.

SIECUS's first leader was Dr. Mary Calderon, the past medical director of Planned Parenthood, who, in 1985, said children "feel sensation from touching and from genital stimulation from infancy on." SIECUS material condones incest in a pamphlet called "Dealing with the Last Taboo." There is also a professional association for sex education leaders, the Society for the Scientific Study of Sex (SSSS), founded by Kinsey associates. It is dominated by sexologists who believe that sexual relations between adults and children is normal. So what? So plenty: SSSS controls the content of nearly all sex education curricula through its accreditation guidelines.

Indeed, a study of the sex education movement by the Institute for Media Education, co-authored by Dr. Judith Reisman, found that a large number of the sex education leadership, including SSSS leaders, are either admitted pedophiles, have published in pedophile publications, have publicly advocated sex between children and adults, or are actively involved in the porn industry. For example, Dr. John Money of John Hopkins University, a past SSSS president, told an interviewer he supports sexual sadism in relations between boys and adults if "consent" is obtained first. "A childhood sexual experience," he said, "such as being the partner of a relative or of an older person, need not necessarily affect the child adversely."

Some will say all this is history, that today's sex education curriculum is a model of responsibility. Wrong. The following quotes are from among the most popular of today's sex education textbooks, teacher manuals, or recent sex education conferences:

> "For you, exploring sex might mean kissing and hugging someone you're attracted to ... Later, it might mean giving each other orgasms, or even making love ... Often this kind of sexual exploring is with a friend of your own sex." — "Changing Bodies, Changing Lives" (distributed by Planned Parenthood);
>
> "I have known cases of farm boys who have had a loving sexual relationship with an animal and who felt good about their behavior until they got to college ... where they were made to feel guilty." — *Boys and Sex* by Ward Pomeroy, Kinsey Report co-author, distributed by Planned Parenthood;
>
> "There are many girls who regret after marriage that they didn't have premarital intercourse, because they've come to realize what a long, slow learning process it is after marriage ...." — *Girls and Sex*, also by Ward Pomeroy and distributed by Planned Parenthood;
>
> "Masturbation is a topic that is viewed negatively in many families .... Assure parents that your approach will be low-keyed and will stress privacy, but make it clear that you will not perpetuate myths that can mar children's healthy sexual development." — "Learning About Family Life," a teacher's manual;
>
> And from SIECUS's "Guidelines for Comprehensive Sexuality Education: Kindergarten —12 grade" (For ages 5-8): "Some men and women are homosexual, which means they will be attracted to and fall in love with some of the same gender." (For ages 9-12): "Homosexual love relationships can be as fulfilling as heterosexual relationships." (For ages 15-18): "The telephone number of the gay and lesbian switchboard is 1- ...."
>
> "The big lie is that it's easy to be monogamous, and that everybody is. If you believe that, you'd better choose well. We can't go back to the values we had because they don't exist anymore. For the most part, women are not virgins anymore, so to teach virginity doesn't work." Carol Cassell, ETR Family Life Education Institute conference, August 9, 1989.

Certainly other sex education programs are less explicit, but nearly all adhere to the Kinsey philosophy: all sex is healthy, regardless of age, religious beliefs, social mores, or parental wishes. The message is usually subtle, couched in terms such as "safe sex," but the result is the same: unwanted pregnancies, more disease, more social problems. And most parents have no idea this approach is *status quo*. Indeed, the sex education industry assured Americans in the '60s that "comprehensive" sex education would do away with unwanted pregnancies. But statistics from the Health and Human Services Department, from the Centers for Disease Control, and from the "Statistical Abstracts of the United States," tell us Kinsey sex education has created a major teen pregnancy crisis. Birth rates per 1,000 unwed teenage girls went from 13.5 in 1951 to 45 per 1,000 girls in 1993. According to Planned Parenthood, the percent of 17-year-old girls having pre-marital sex went from 15 percent in 1955 to 52 percent in 1987; for 16-year-old girls, the percent went from 8 percent in 1955 to 34 percent in 1987; and for 15-year-olds, it went

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from 3 percent in 1955 to 28 percent in 1987. Overall, teen pregnancies have increased 90 percent, teen abortions 230 percent, and reported cases of venereal disease 140 percent.

Even sex education industry journals have published research showing the failure of Kinsey's "comprehensive" approach to sex education. In 1986, researchers Stan Weed and Dr. Joseph Olson wrote in *Family Perspective Journal* that, "Instead of the expected reductions in overall teenage pregnancy rates, greater teenage involvement in family planning (contraceptive-based) programs appear to be associated with higher, rather than lower, teenage pregnancy rates." Moreover, research shows that states spending most on "family planning," such as California, have the largest increase in abortions and out-of-wedlock births. States that do not mandate sex education, such as Wyoming, have far lower teenage pregnancy rates than those that do. No reliable studies show any correlation between sex education and reduced pregnancy rates. On the contrary, studies show more explicit sex ed increases pregnancy rates.

The response to this escalating crisis is, as always, to spend more money on "family planning," which the Wilson Administration has done over the last few years, statistics be damned. In 1995, the Legislature passed the "Teenage Pregnancy Prevention Grant Program," distributing $10 million to schools for sex education programs. The legislation prohibited distribution of condoms, but the Department of Education's own grant application documents list a variety of sex education programs that feature "contraceptive services." Moreover, none of the programs suggested by the department are effective abstinence-based programs and the grant application makes clear that condoms can indeed be distributed as part of the program as long as "funds from the Teenage Pregnancy Prevention Grant Program" are not "used to distribute condoms."

In other words, all a school has to do is kick in a few bucks to pay for the condoms, and they have a program Kinsey would be proud of. This violates existing sex education codes, but who cares when nobody enforces the law? California *does* have some decent sex education codes, thanks to Senator Newt Russell who authored a successful 1988 bill, SB 2394, amending California's sex education codes to require that all sex education curriculum material and instruction shall:

- Stress that pupils should abstain from sexual intercourse until they are ready for marriage.
- Teach honor and respect for monogamous heterosexual marriage.
- Stress that abstinence is the only contraceptive method which is 100 percent effective and that all other methods of contraception carry a risk of failure in preventing unwanted teenage pregnancy.
- Include a discussion of the possible emotional and psychological consequences of pre-adolescent and adolescent sexual intercourse outside of marriage.
- Be age-appropriate.

The trouble is, most sex education programs currently used in California schools do not comply with the guidelines, and Superintendent of Public Instruction Delaine Eastin has made no effort to enforce the law (though she complains regularly that more needs to be done about the teenage pregnancy epidemic).

On the legal front, the ACLU has threatened lawsuits against numerous schools in California, including Vista and Hemet school districts, over their use of abstinence-based programs. The ACLU actually claims "that teaching that monogamous, heterosexual intercourse within marriage is a traditional American value is an unconstitutional establishment of a religious doctrine in public schools." That is, schools must teach nothing that happens also to be in the Bible! The U.S. Supreme Court has ruled abstinence programs legal, but the ACLU still intimidates ignorant school boards. When the Conejo Valley school district chose an abstinence program, the American Association of University Women (AAUW) led the charge, claiming abstinence-based programs are "not representative of all populations." What? Apparently advocating abstinence discriminates against the pervert section of the population. Modesto schools dropped "Sex Respect" after Planned Parenthood launched a campaign calling the program "a fear and shame-based curriculum."

Eastin has jumped into the fray, calling Sex Respect "fear-based" at a homosexual educators conference. When Orange County gave a $606,000 grant to an abstinence-based group, Planned Parenthood persuaded the Department of Health Services to review the grant's legality. People for the American Way, NOW, the League of Women Voters, and other members of the liberal cabal have coordinated attacks on any school district that even *thinks* about abstinence. Also condom makers: Durex Consumer Products launched a "Truth for Youth" campaign complete with Jane Fonda as spokesthing, attacking abstinence and urging "balance." Even the Legislature's Legislative Counsel opined that Sex Respect is illegal because the "student workbook in effect and considered alone does not provide the information regarding the role of condoms in reducing the risk of in-

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fection from the human immunodeficiency virus ...."

The war on abstinence escalated when the federal government — responding to overwhelming evidence that abstinence programs work — appropriated $50 million in 1996 for abstinence programs nationwide. In California, which is slated to receive $5,764,199 per year for five years, liberals urged Wilson not to accept the funds. SIECUS sent a directive to all its members urging them to persuade state officials "that abstinence-only programs are ineffective and that you want effective comprehensive sexuality education programs for young people in your state." Under such pressure, the Wilson administration hesitated, but in the end accepted the funds. Pro-family groups are not, however, holding their breath. The same DHS officials doling millions to "have sex with anyone, anytime" groups will distribute the federal abstinence funds. So far, it doesn't look good. At a January 15-16 health educators' conference co-sponsored by the health services and education departments, speakers repeatedly bashed abstinence-based programs, with Wilson's DHS appointees cheering on. Keynoter Judith Billings set the tone:

> Study after study shows that abstinence does not reduce the onset of teen sexuality .... and therefore does not work .... This is what happens when we limit programs to a method that didn't work since the time of Adam and Eve when they were told, "Don't do it" by a higher authority. It didn't work then, and it won't work today ... more damage done by abstinence-only is the complete refusal to recognize the needs of gay and lesbian youth ... We need to absolutely reject legislative direction that puts religious doctrine over practical health ... my God does not bring disease upon people ... God is a loving, compassionate God. . .The devil must smile at his recruited troops of people doing his bidding ... the demon bigots will take control if we do not.

Billings received a thunderous ovation for these bigoted, insulting remarks. Other speakers encouraged groups to apply for federal abstinence money but not use it for abstinence education. In other words, a DHS-co-sponsored seminar encouraged school health officials to break the law.

In 1997, Wilson launched an abstinence program of his own — the Community Challenge Grant (CCG) program — which appropriated $63 million for local abstinence-based programs. But the first round of grants went almost exclusively to Kinsey-type sex education programs. CCG rejected an Escondido abstinence-based program's application because it was told by CCG Director Anna Ramirez that the program, Community Impact Program, was "abstinence only," and that abstinence was not proven effective! This author obtained the DHS scores sheets used for grading the Community Impact Program. They were downgraded because the program "relies heavily on volunteers," was connected to a "Right to Life/religious agency," its "strategies — very narrow," and it promotes "personal purity." Whoa. Enraged legislators, hearing that pro-abstinence groups were being rejected, met DHS Director Kim Belshe, who committed verbally and in writing that "abstinence-oriented programs will be funded." It never happened. DHS funded a total of 107 sex education groups; only two promote abstinence in any meaningful way. At least five applicants from San Diego, Orange County, Stockton, and San Francisco were turned down for emphasizing abstinence. The Capitol Resource Institute's Michael Bowman said, "If the state is already telling kids not to smoke or do drugs, why is DHS afraid to tell kids to say no to pre-marital sex?" Assemblyman Curt Pringle asked how and why certain applications were downgraded, even taking his concerns to the governor's office, but nothing happened. The CCG bureaucrats, after all, are the same people who co-sponsored the seminar bashing the federal abstinence program.

So, California's three sex-education programs allegedly designed to promote abstinence — the Teenage Pregnancy Prevention Program funded by the Department of Education, the state-funded, DHS-managed CCG program, and now the federally-funded, DHS-managed abstinence program — all claim to fund abstinence programs, but the first two don't and it remains to be seen whether the last one will.

We are left with numerous questions. Does the governor know what his appointees are doing in his name? If he does, will he terminate those acting against his stated views? Will Delaine Eastin continue to allow public schools to use sex education programs that do not comply with California's sex education codes? CPR

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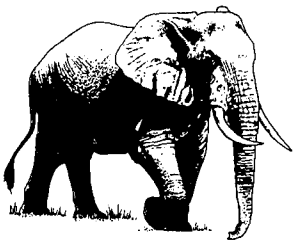
A California Political Review Debate



Resolved:

Michael Capizzi

has been a good Orange County District Attorney.

Affirmative

Edward R. Jagels

ORANGE COUNTY D.A. Mike Capizzi's speeches aren't going to make anyone forget Winston Churchill. Come to think of it, they're not even going to make anyone forget Bob Dole. His style is measured, controlled, legalistic, and — yes — downright boring. No audience at a Capizzi fundraiser will ever swarm out into the street ready to do battle with evildoers, galvanized by the force of the prosecutor's rhetoric.

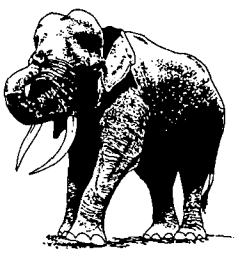
Yet, it is precisely Capizzi's careful, calm, and cautious approach to public safety issues that has made him the standard bearer for law-and-order conservatives in his campaign for attorney general. Months before the primary, over three fourths of California's elected District Attorneys (including a large number of Democrats), and almost half the Sheriffs, have already endorsed Capizzi. While some no doubt are at least partially motivated by distaste for his likely opponent, ultra-liberal Senator Bill Lockyer, law enforcement's overwhelming support for Capizzi is a clear indication that he is perceived as an able and honest professional.

Capizzi's stature with law enforcement is no accident. He has "earned his stripes" over the last 30 years, trying tough cases, fashioning innovative programs, and building the Orange County D.A.'s Office into a nationally-respected prosecutorial agency.

Ed Jagels is the Kern County District Attorney. In 1990, he co-authored and acted as campaign chairman for the Crime Victim Justice Reform Act (Proposition 115), which streamlined California's criminal justice system and reversed numerous Bird Court decisions.

Negative

Leon McKinney



HERE'S ORANGE County District Attorney Michael Capizzi two years ago, responding to accusations that his prosecutions of Assemblyman Scott Baugh and others involved in the 1995 special election that recalled Doris Allen and replaced her with Baugh were selective and motivated by Capizzi's personal political ambitions: "A cornerstone of democracy is public confidence in the electoral system. In this regard, a prosecutor's duty is to vigorously enforce the law in general and in particular as it applies to assure honest elections" because "Orange County is not Chicago." Also, "We don't concern ourselves with the political ramifications of what we do. We simply react to the conduct of others. If people commit criminal acts we're going to respond."

Now, here's Capizzi after closing his investigation of *Hermandad Mexicana Nacional's* Santa Ana chapter and its leader, Nativo V. Lopez, for possible conspiracy to commit voter fraud and other felonies during the 1996 Dornan-Sanchez 46th Congressional District election: "*Que sera, sera.* Orange County isn't Chicago; it's Mexico City. And I want to make sure Hispanics consider me their friend as I run for attorney general." Okay, okay, Capizzi never really said that as far as I know. But, judging by his handling of *Hermandad*, I wouldn't be surprised if that's what he thinks.

Capizzi's claims that his prosecutions are impartial, apolitical, and driven by his passion for "honest elections" are echoed by James P. Fox, San Mateo County DA and former California District Attorneys Association president. "It is clear," Fox wrote to the *Orange County Register* in April 1996, "that for a number of years there has been a 'single standard' in political

Leon McKinney is a long-time observer of and writer on Orange County politics.

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Jagels

No portion of the district attorney's mission is more frustrating than welfare fraud prosecution. Overworked D.A.s traditionally have tended to give the area short shrift, believing that the resources dedicated to such cases are better directed at "more serious" crime and that "the judges won't give welfare cheats any jail time anyway." Mike Capizzi didn't accept that view. His response to the problem has made Orange County a model "welfare fraud" county, repeatedly studied by other jurisdictions.

Capizzi helped create and later greatly expanded the county's Early Detection Program. Rather than passively wait for the occasional welfare fraud case to be brought to him, Capizzi assigned investigators to review thousands of welfare applications which appeared in any way suspect. About 70 percent turned out to be fraudulent. While the program still includes a prosecution component, the main purpose is to detect and deny applications of people who aren't entitled to welfare benefits. In 1996, the program saved the taxpayers over $87 million.

Capizzi has also been tough on violent crime. The TARGET program, a combined prosecution, police and probation effort, was created by Capizzi and others to smash the gangs in the City of Westminster. In two years, serious gang-related crime declined by 67 percent. The program was so successful the Board of Supervisors provided funds for its expansion to six other cities.

Perhaps the pinnacle of any lawyer's career is the opportunity to argue a case before the United States Supreme Court. Only a handful of attorneys have ever done so. Capizzi is a member of that elite group. He wrote the briefs and successfully argued and won two cases of immense importance to the administration of justice, and perhaps even to our society's quality of life.

IN *MILLER V. CALIFORNIA*, the issue before the Court was whether a nationwide "lowest common denominator" standard for obscenity must apply, or whether, on the other hand, local community standards could be used to determine what is obscene. The answer to this question would determine what kind of material could be proscribed as pornography. The case was of seminal importance in any effort to inhibit the gradual coarsening of our lives which an avalanche of por-

McKinney

corruption cases in Orange County: vigorous prosecution of anyone who violates the law, based upon facts and law. No consideration is given for politics." Is that so? Let's look at Capizzi's record.

In 1993, Capizzi sat on complaints that the Tustin Unified School District and other districts were violating the state education code and the 1974 Political Reform Act by campaigning against Proposition 174 using school resources and during class. Although the complaint was filed on September 29, 1993, amid substantial press coverage of the allegations, the D.A.'s office ignored it until November 17, conveniently after the election was over and 174 had been defeated.

In 1994, Fullerton City Clerk Ann York refused to order a special election that would have forced several city council members (friends of hers) who'd just been recalled for raising taxes to vacate their seats. Recall supporters say after Capizzi ignored the complaint they'd filed they went to court, where the judge directed the clerk to call the election. Capizzi claims he took no action because his office was never contacted. However, the *Orange County Register* ran articles and editorials about the Fullerton recall being thwarted by York. Why would a D.A. so vehement about "honest elections" wait for someone to file a complaint?

COMPARE THOSE TWO episodes involving the liberal government establishment — where Capizzi yawned — with his investigations of Baugh and other conservatives. Here, according to his friend, liberal Republican political consultant Eileen Padberg, Capizzi started the Baugh investigation because "the *LA Times* was investigating it so aggressively that he had to take a look at it." When the county grand jury refused to indict Baugh in 1995, Capizzi didn't give up as he did later with Hermandad; he empanelled a new grand jury in 1996 to get a 22-count indictment against Baugh. Orange County Judge James Smith threw out the indictment in September 1996, saying Capizzi had "destroyed the independence of," "misled," and "improperly used" the grand jury. Among other acts, Capizzi withheld exculpatory evidence that tended to clear Baugh and directed the grand jury to investigate *Register* reporter Jean Pasco's opinions of his prosecutions. Capizzi then refiled charges directly against Baugh. Another judge then threw out many of the charges again.

I was told by some of Capizzi's

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Jagels

nography inevitably brings.

Capizzi successfully argued that, within certain limits, local jurisdictions have the right to impose consensus standards in defining obscenity and the right to criminalize the dissemination of material so defined. A loss could have meant that the attitudes of West Hollywood or San Francisco's North Beach would set obscenity standards for our neighborhoods.

Capizzi also personally argued and won the landmark U.S. Supreme Court case of *Hicks v. Feiock*, which was a watershed event for those charged with enforcing child support obligations. In California, the district attorney has that responsibility. At Capizzi's urging, the Supreme Court reversed a California appellate court and held that in child support civil contempt actions, the defendant (the non-paying parent) rather than the district attorney has the burden of proving his or her means, or lack thereof, to pay child support. This seemingly arcane ruling about who has the burden of proof has important ramifications. A parent can be jailed for contempt in such cases only if it can be shown that his or her failure to pay child support is willful. Usually the district attorney has little information about the defendant's ability to pay; the defendant, on the other hand, always knows. Had the appellate court ruling stood, it would have made it virtually impossible to collect child support through the use of contempt proceedings. As a result of the *Feiock* decision, thousands of California's children are better off and millions of dollars in welfare payments have been saved. Capizzi's early appreciation of the significance of the case, and his willingness to take on what many perceived as a lost cause, has made a tremendous difference.

There is nothing illegal about setting up a "straw man" candidate, but there is plenty illegal about lying about the source of a campaign contribution.

Given Capizzi's accomplishments, you might wonder why we are debating his record in the pages of a journal of conservative

McKinney

targets in the Baugh case that investigators told them Capizzi would "be glad to trade an assemblyman for a congressman [Rohrabacher] or a speaker [Pringle]." Baugh told me Capizzi's prosecution of him, his Huntington Beach district office chief of staff Maureen Werft, Representative Dana Rohrabacher's campaign manager and fiancee Rhonda Carmony, along with his prosecution of two Orange County supervisors and other county officials in connection with the 1994 county bankruptcy were designed to provide cover for his having failed to investigate and prevent the bankruptcy — Capizzi ignored a 1993 audit of county investments that indicated county treasurer Citron's schemes were dangerous and rebutted John Moorlach's warnings in the summer and fall of 1994 — and to enhance his statewide name recognition. "No consideration is given for politics"?

Contrast Capizzi's hell-for-leather prosecution of Werft with his "oh well" attitude toward Hermandad. Capizzi filed *felony* charges against Werft in March 1996 for having registered to vote and having voted in Orange County while working in Sacramento for the summer of 1995. Supporters of Werft found more than 100 individuals in Werft's district apparently illegally registered at business addresses. Discussing this with county registrar staff, they learned former Registrar Don Tanney had informed Capizzi of hundreds of such violations countywide, but that Capizzi had done nothing. Tanney acknowledged to me that he had referred "20 to 50" cases of illegal voter registration and voting to Capizzi and that to his knowledge Capizzi had indeed taken no action. Werft ended up pleading guilty to misdemeanors and filed for bankruptcy.

By now, the numbers involved in the Dornan-Sanchez election contest are well known: 748 people were positively identified by the U.S. House investigation as having illegally voted in the 46th Congressional District election. "Circumstantial" evidence indicated another 196 had also voted illegally. According to INS records, only 156 of the 1,278 Orange County residents registered by *Hermandad* prior to November 1996 were confirmed as legal voters.

Hermandad was proven to have offered money and prizes (a new car) for registering and voting through *Hermandad*. Dornan foe Michael Farber, according to published reports, allegedly bragged of

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opinion. There is a simple two-word answer: Scott Baugh. Capizzi is prosecuting Republican Assemblyman Baugh and several others for campaign law violations. This effort has infuriated some highly partisan and very influential Republicans who accuse Capizzi of "grandstanding" and currying favor with Democrats. Baugh is innocent, they argue, and even if he isn't, Capizzi's reaction has been disproportionate. The violations are "minor" and should be settled by the FPPC.

THUS FAR, four defendants have pleaded guilty to misdemeanors involving signature gathering. Baugh is set for trial. He is accused of concealing a $1,000 contribution from Laurie Campbell, a Democrat whom his staff allegedly later set up to run in the same special election in which Baugh himself was running. (It was believed that her presence was necessary to split the Democrat vote and insure a Baugh victory.)

If the press and public knew about the contribution, the nature of the scheme would have been obvious and Baugh's chances adversely affected. So Baugh allegedly reported that the contribution, the existence of which could not be hidden, was a loan from him to his own campaign.

There is nothing illegal about setting up a "straw man" candidate, but there is plenty illegal about lying about the source of a campaign contribution. In fact, this sort of evasion is exactly what the Political Reform Act, which Capizzi has a duty to enforce, was designed to prevent.

Ironically, most of the politicians whom Capizzi has prosecuted in the past — Assemblyman Bruce Young, Mayor James Wilson, former Orange County Treasurer Robert Citron, Supervisor Robert Battin, kingmaker Louis Cella — have been Democrats. Only now is he being subjected to criticism for a "political" prosecution. Mike Capizzi is doing his job the way we conservatives expect it to be done. He ought to be allowed to do it without carping by his natural allies.

Rebuttal: McKinney

So Michael Capizzi has lowered the boom on deadbeat dads, gangster homeboys, porn purveyors, and welfare cheats. One cheer for Mike Capizzi. I think he would have

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hiding *Hermandad* files from D.A. investigators. Nativo Lopez predicted for more than a year he would be indicted, saying, "mistakes may have been made." Sanchez campaign manager John Shallman stated in sworn testimony to Congress that Lopez asked for money in exchange for persuading voters to cast ballots for Sanchez. Lopez's wife and another *Hermandad* employee refused to be interviewed by investigators and fled to Mexico. According to Capizzi the pair illegally registered 632 non-citizens. Other *Hermandad* staff members also refused to be interviewed. Many of the people *Hermandad* had registered claimed to speak no English and flashed little cards in the faces of investigators declaring they were invoking their Fifth Amendment rights against self-incrimination.

With all this Capizzi failed to get indictments and then, unlike in Baugh's case, declined to file charges directly. How many more illegal votes would have been uncovered had Capizzi pursued *Hermandad* as zealously as he did the county supervisors, Baugh, Werft, and Carmony?

Capizzi withheld exculpatory evidence that tended to clear Baugh and directed the grand jury to investigate *Register* reporter Jean Pasco.

Government school employees get to use taxpayer dollars to campaign. City clerks can nullify elections. Both Capizzi and the county supervisors fail to watch over our tax monies, but only the supervisors get prosecuted. An assemblyman is hounded to get "a congressman or a speaker." Maureen Werft, bankrupted, was forced to plea bargain for the crime of registering and voting one time in her home district, while Hispanic activists get off scot-free for registering hundreds of non-citizens. It is illegal for Capizzi willfully to choose to prosecute some cases but not others solely due to his personal political reasons. He's been an appalling district attorney.

Rebuttal: Jagels

What is most illuminating about Mr. McKinney's argument is what he *doesn't* talk about! On the resolution: Resolved that Michael Capizzi has been a good Orange County District Attorney, Mr.

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McKinney

served taxpayers better by reading former Orange County Auditor-Controller Steve Lewis's August 1993 audit, which raised suspicions about Bob "Vegas" Citron's investment schemes. Instead, Capizzi denied in Court ever receiving the audit (strange, all seven supervisors received it, as did the media and numerous citizens, including me). He then attempted to prosecute Lewis and two county supervisors, charging they had failed to act on the information in the audit. But California's Fourth District Appellate Court removed Capizzi from the case, recusing him after finding that the D.A.'s office had received the audit and that the prosecution should not proceed in the hands of a man whose *own* failure to act on the information gave him a strong incentive to lay blame elsewhere.

Now, on Scott Baugh: Attorney Dana Reed, a leading expert on the Political Reform Act, tells anyone who'll listen that investigating Baugh and Campbell was the FPPC's responsibility until it uncovered criminal acts. "Only in Orange County do we have a D.A. who appears obsessed with PRA violations," Reed told reporters.

Capizzi's prosecution of Baugh involved severe abuses of his office. On December 22, 1995, seven armed D.A. investigators raided Baugh's house, refused to allow him to get dressed, assaulted him, and tried to take his camera when he took pictures of them. Capizzi denied everything until a witness confirmed the struggle, then Capizzi claimed his thugs had politely asked for the camera and that an investigator had merely "bumped" Baugh.

The raid occurred right after Baugh's supporters filed a complaint against Capizzi himself for committing the *same* election code violations on his, Capizzi's, own nomination papers for which the D.A. was busy prosecuting Rhonda Carmony. Capizzi released his 22-count indictment against Baugh five days before Baugh's March 26, 1996, primary, after many press leaks — a gross violation of the prosecutors' code of conduct which says prosecutors should bend over backwards to avoid even *appearing* to influence elections.

In September 1996, Superior Court Judge James Smith threw out the substance of Capizzi's Baugh indictment. The judge said Capizzi had "misled," "im-

Jagels

McKinney ignores 69,000 prosecutions a year, thousands of dangerous felons sent to state prison, hundreds of difficult jury trials successfully prosecuted, a crime rate down 35 percent, child support collections up 30 percent, a statewide influence on legislation and training.

No, Mr. McKinney instead cites *five* cases in which either Republicans were defendants or Democrats in his view were not harried with sufficient ardor.

This tendency to judge a district attorney by political criteria, rather than the manner in which he or she conducts the meat-and-potatoes public safety aspects of the job, is worrisome, because it portends a time when the election of prosecutors may be decided on partisan considerations irrelevant to competence. But, this a rebuttal, so I better get to rebutting:

1. *Maureen Werft* — Ms. Werft, who later became Scott Baugh's chief of staff, had lived in Sacramento for more than a year when she volunteered to work on the Doris Allen recall and the Baugh campaign. She continued to live in Sacramento, commuting to Orange County on weekends. In order to be able to vote for Baugh, she registered at an acquaintance's apartment, which she had never even visited. She then voted. That's illegal, as even Mr. McKinney must concede. Ms. Werft pleaded guilty to a misdemeanor.

2. *Scott Baugh* — Contrary to Mr. McKinney's assertion, the 1995 grand jury was *never asked* to indict Mr. Baugh. It merely aided in the investigation by taking the testimony of a few witnesses shortly before its term ended. The indictment of Baugh by the 1996 grand jury was quashed by Judge Smith because of a so-called *Johnson* error. The ruling was based on a highly arcane legal point, having nothing to do with Baugh's guilt or innocence.

There is an interesting (and amusing) sidelight to the Baugh case. Remember the "straw man" candidate, Laurie Campbell? The "real" Democrat, whose vote the Baugh forces sought to split, was Linda Moulton-Patterson. She turned in signatures on her nomination papers which she claimed she had personally collected, but hadn't. She was reported to the D.A. by none other than Mr. McKinney. And Capizzi prosecuted her, obtaining a stiffer sentence than Ms. Werft got. Funny, Mr. McKinney apparently doesn't think Capizzi's

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properly used," and "destroyed the independence of" the grand jury. The D.A. withheld evidence that cleared Baugh: several dozen statements by Baugh's treasurer, Dan Traxler, that established that *Traxler* was responsible for falsifying Baugh's campaign reports, that he had assured Baugh the reports were correct, and had urged him to "go ahead and sign." Baugh had no knowledge of the reporting errors. Thus, as Judge Smith said, Traxler's grand jury testimony, sanitized by Capizzi to include only what appeared to implicate Baugh, "had no credibility." Also, the prosecutors and the grand jury foreman nine times illegally refused to permit one witness, James Righeimer, to leave the room to confer with his attorney. George Kennedy, president of the California District Attorneys Association, asked for the transcript of Righeimer's interrogation to use as an example of what *not* to do.

Capizzi's response to Judge Smith? Have Assistant D.A. Brent Romney "hint" broadly, in private, to the judge that an embarrassing episode involving Smith's wife might be disclosed *unless Smith recused himself.* When Smith refused to be bullied, Capizzi refiled charges directly against Baugh.

Baugh offered to plead guilty to the *misdemeanor* of *unintentionally* filing incorrect campaign reports. But Capizzi demanded a guilty plea to *intentionally* filing them — a felony that would deprive Baugh of his Assembly seat and his law license. What kind of D.A. not only supresses evidence showing clearly that not Baugh, but his treasurer, is responsible for reporting errors, but goes even further, continuing to hound Baugh regardless of the evidence? One kind would be a D.A. running for Attorney General *and* disinclined to let the mere innocence of a juicy target interfere with his political ambitions.

Baugh told me he'd "never" admit to a crime he had not committed. Last September 14, Traxler, in a deposition, gave a written confession *again* exonerating Baugh. On November 24, a second judge — Bill Evans — largely repeated Judge Smith's acions, *again* dismissing most of Capizzi's charges against Baugh.

Capizzi's blatant double standard in choosing who, what, and how aggressively to prosecute and his appalling abuses of his office should embarrass other D.A.s. Instead they circle the wagons. It's troubling that so many D.A.s seem to see protecting and promoting one of their own as more important than the integrity of the justice system. CPR

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conduct in prosecuting Ms. Moulton-Patterson was "appalling." But, then, she's a Democrat.

3. *Fullerton City Clerk Ann York* — Ms. York, in an apparent attempt to save money, wanted to schedule a recall during a regular election. The Superior Court ordered her to call an immediate special election. It was a purely civil matter, over which the district attorney had no authority.

4. *Tustin School District* — The District printed some material critical of the voucher initiative, and some speakers at a staff motivational meeting denigrated the initiative. Unfortunately, while the Penal Code prohibits expending public funds on electioneering, the Education Code at the time allowed expenditures for the dissemination of "factual" information relating to the district. The conduct in question arguably was protected under the latter code. That's too bad, but hardly proof of a left-wing conspiracy within the District Attorney's Office.

5. *Hermandad Mexicana* — The case was taken to the Grand Jury by Capizzi's Office, but the Jury

refused to indict anyone. Since the proceedings are secret, we don't know why for sure, but some deductions are possible.

The people who registered were told that they could legally do so, and probably did so in good faith. The targets of the investigation were the individuals who signed them up. These persons, in turn, probably claimed that they thought it was all right to register people who would be citizens by election time. The Grand Jury may have found that persuasive.

MR. MCKINNEY also accuses Capizzi of "fail[ing] to investigate and prevent the bankruptcy [of Orange County]," but the district attorney has no authority over the investment decisions of the treasurer, an independent elected official. One might as well blame the sheriff or the parks director as Capizzi.

One final note: a cursory glance at Mr. McKinney's piece reveals that virtually every one of his sources is a defendant. I hope that if he ever writes anything about me he talks to someone other than just the guys I am prosecuting. CPR

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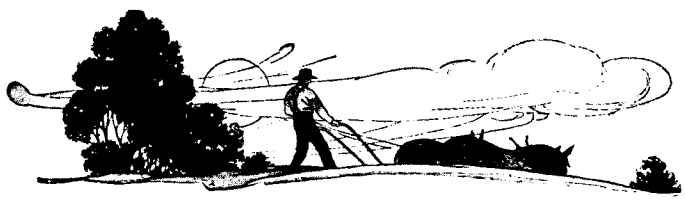
Republicans Turn Tail on Dornan-Sanchez



Clinton's INS learns its record-keeping is an embarrassment, even for a government agency; Congressional Democrats learn the GOP won't fight vote fraud.

Leon McKinney

THE HOUSE OF REPRESENTATIVES voted in early February to end former Representative Robert Dornan's challenge of his 1996 defeat by Representative Loretta Sanchez, saying that with "only" 748 documented illegal votes plus another 196 votes that the evidence strongly indicated were also illegal, Dornan had *not* met the criteria for overturning Sanchez' 979-vote victory.

Republicans trumpeted what House Oversight Committee Chairman Bill Thomas (R-California) called a "precise and legally determined analysis," adding that they had made it "clear that future vote fraud will not escape the scrutiny of this House of Representatives." Bull. What the Democrats have learned is that Republicans won't fight vote fraud. From the beginning, it appeared GOP leadership had decided Dornan must not win. Why? Evidently, the imperatives of avoiding the dreaded "racist" label and staying out of anything that might resemble a tough political fight simply outweigh concerns for fair and honest elections.

Republican leaders cooperated with Democrats in setting criteria for determining what constitutes an illegal vote that made it extremely (and, in the interests of reasonable proof, unnecessarily) difficult to throw out *any* votes as illegal. They also allowed the Department of Justice and the INS to stonewall Congress, while shrugging their shoulders at a mountain of evidence indicating that Sanchez, her campaign, and *Hermandad Mexicana Nacional* might have committed felonies.

The House Oversight Committee reported that, of the original 7,841 "suspect votes" in California's 46th congressional district 1996 election — a list comprised almost entirely of people that INS databases indicate are non-citizens for one reason or another: they'd applied for naturalization, student visas, permanent resident alien status, refugee status, or had been deported for committing crimes — it turns out that 5,303 were "legitimate registrants" according to Congress. In other words, Doris Meissner's INS is so unbelievably incompetent even for a government agency that 68 percent of those whom INS records indicate are non-citizens really are citizens after all!

The remaining 2,538 individuals were "suspect registrants"; of these, 1,718 didn't vote and 820 did. Of that 820, 624 were declared "documented" illegal voters while only "circumstantial" evidence indicated the other 196 had voted illegally. House Oversight added 124 absentee ballots disallowed by the Orange County Voter Registrar to the "documented" 624 illegal votes to arrive at the final number of 748.

Something smells here. Republicans were right to insist on a rigorous, fair process, but then went too far. In comparing INS records with the Orange County voter files for the 46th, the requirement for determining an illegal vote was that for each voter in question the listing in the voter file had to match up with an INS listing *exactly* by name, birth date, birthplace, *and* address. Ding, ding, ding. That last hurdle cleared almost every suspect voter. Californians *do* move frequently, and immigrants more often than others. So, if you're a non-citizen, just move at least once and your vote won't be challenged. Great. Thanks, Newt.

AND THANKS ALSO, NEWT, for allowing the Justice Department to ignore repeated formal requests by Congress to prosecute Sanchez, *Hermandad*, and everyone else who refused to comply with subpoenas duly issued under the FCEA, and for allowing INS to stonewall. When will Republicans learn to use their powers as Congressional majority to compel executive branch officers to appear and answer for their acts? When will they learn, for instance, to zero-out budget appropriations if necessary for agencies that violate their constitutional duty to be accountable to the Congress? Probably never.

And why aren't Dornan and his attorneys yelling about this appalling betrayal? Maybe because the House is still debating whether to pay Dornan's $500,000 legal fees. The Democrats, having stolen an election and bullied Republicans into cooperating, have also arranged that you and I will pick up Sanchez' legal bills but are insisting that Dornan, as the "loser," cover his own. This gives Republican leaders leverage to keep Dornan quiet: if he isn't, they might arrange to agree with Democrats not to pay his bill. And people wonder why I'm considering leaving the Republican party. CPR

Leon McKinney is a CPR *contributing editor.*

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Kanner

(Continued from page 10)

ideological zenith (and simultaneously its democratic nadir) in 1973, when California Supreme Court Associate Justice Mathew O. Tobriner wrote an article calling for a "social revolution" to be wrought through the courts at the behest of "young lawyers," persons even less qualified than judges to shape society. Of course, such talk was ideological mummery. The same judges who enthusiastically assumed the mien of giants ever ready to revolutionize whatever field of law and human behavior their subjectively-held reformist zeal called for, would abruptly proclaim themselves meek servants of 19th Century law, powerless to enforce even explicit constitutional guarantees, or rectify even conceded flaws in existing rules of judge-made law, when the results would be inconsistent with their ideological predispositions. Judicial rulings in the area of constitutionally-protected property rights are an obvious example of that phenomenon.

Finally, though hardly surprising to fans of Murphy's law and of Lord Acton's aphorism that power tends to corrupt, there arose an unintended fallout from a combination of these factors. Judges who act like a Kadi sitting under a tree, dispensing judgments by individual notions of fairness, are not likely in the long run to confine their freewheeling style to public policy controversies that originally inspired this model of judging. In this brave, new judicial regime, sooner or later any controversy, no matter how pedestrian, becomes grist for the idiosyncratic judicial "fairness" mills, with the result that by degrees law is ceasing to be a reliable guide to human conduct, because even the best lawyers increasingly cannot say whether a judge will enforce the rules, even when faced with straightforward legal issues. We are drifting dangerously close to Ambrose Bierce's satirical definition of "lawful" as "anything compatible with the will of a judge with jurisdiction." This, of course, only provides incentives to more litigation.

But be all that as it may, it didn't take a rocket scientist to figure out that with judges legitimized as the unchecked spearhead of ideology and social change, a political party with judicial appointing power could not advance its agenda and short-circuit the messy legislative process simply by placing on the bench judges willing to advance their political patrons' views. And so, during the Carter administration Democrats set up ideologically-minded citizens' committees that held public hearings to screen candidates for judicial appointments, and to insure that they were suitably diverse and that their notions of fairness and social justice passed ideological muster. Which is not to say that earlier judicial candidates were not screened, vetted, and otherwise examined to insure that they were not only professionally sound but also compatible with the ideals of the appointing authority. The old style of judicial selection had its components of cronyism and politics. But the difference now was that the process of ascertainment of judicial candidates' ideological "correctness" — their commitment to "social justice" and other liberal catchphrases — came out of the back room, as it were, and was presented to the country as a praiseworthy act of civic virtue, rather than the crude effort to skew the law that it has been ever since.

It should thus come as no surprise that with that model of judging and judge-making firmly in place for at least the past two decades,the rules of the game have changed. Senate Republicans are rightfully entitled to claim their prerogatives just as the Democrats did during the Bush administration. What is going on is an ideological war, and it would be folly for Senate Republicans to surrender their own conceptions of how the law should be administered and by whom and let the Democrats have their way with federal judicial appointments. In the real world of competing ideologies and practical politics that would be a suicidal act that cannot be expected to take place. CPR

Norrington

(Continued from page 5)

Francisco's left-wing politics evaporated. Many residents wanted the cross, and that was enough. Petitions circulated. Denise LaPointe, an aide to state Senator Quentin Kopp (the only major San Francisco politician to support Proposition 209), immediately requested a hearing of San Francisco's Landmarks Preservation Advisory Board to discuss the cross's preservation as an historic landmark in the same category as world-famous Coit Tower. As the Board's president, LaPointe became the focal point for city-wide efforts to preserve the cross. The initial landmark strategy failed however, when, in March 1997, the Supreme Court refused to review the Appellate Court's decision. Cross supporters then moved to have the city sell the half acre on which the cross stood, a plan requiring approval of the city Planning Commission, the Board of Supervisors, and the voters. And it happened, in liberal San Francisco.

Following a well-organized campaign of petitions and letter writing, the Commission and the Supervisors (a body with *no* Republican members) *unanimously* approved the sale. Then LaPointe built the broadest pos-

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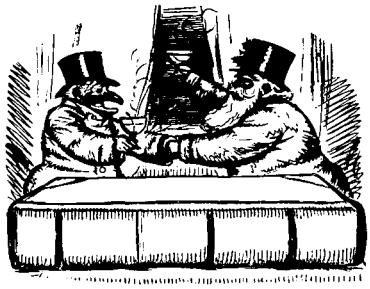

CRITICUS

A Day at the Races

BY G.B. TENNYSON

INSOFAR AS political analogues are relevant, sport, especially professional sport, is generally held to be conservative rather than liberal. Sport glorifies accomplishment within the bounds of rules. It rewards individual excellence. It is the last refuge of genuine achievement, largely untainted by affirmative action. Even those nominally amateur collegiate farm teams operate on the principle that players must stand and deliver or be sidelined. To be sure, Title IX — known slightingly as LEA, the Lesbian Equality Act — is wreaking some affirmative action damage in the world of collegiate athletics, but that patently liberal measure operates on the old separate but equal principle; its damage results from schools having to eliminate successful men's programs in order to introduce such lunacies as women's soccer, as though UCLA, say, were really St. Trinian's. The individual sports themselves continue to stress actual ability, athletic if not academic. Even politically correct Hollywood seems to acknowledge that skill is paramount when it puts forth a film titled *White Men Can't Jump,* though it is doubtful that Hollywood would ever go so far as to title one *Black Men Can't Ski* or *Women Can't Play Football.*

The truism that sport is fundamentally conservative applies as well to the spectator side of professional sports. Joe Six Pack, whether slouched and cheering in front of the television screen or standing and cheering in the stadium itself, is somewhere between apolitical and residually Republican. Certainly one can't imagine Hillary Clinton having a favorite football team. Perhaps she watches women's basketball, which is for the time being enjoying some unmerited, PC-generated television attention, but it looks to the Critical eye to be rather flaccid stuff and unlikely to last, certainly no match for mud wrestling. One cannot imagine Middle America settling down of a Sunday afternoon to watch the "Lady Vultures" play the "Lady Vampires." (These curiously sexist "Lady" names have not yet been banished in college sports but doubtless will be once they are perceived as derivative of the real, *i.e.,* male, teams, which of course they are.)

ALL OF the foregoing being true, Criticus nevertheless herewith denounces contemporary sports and, with a final look at the endlessly delayed men's downhill skiing in the Winter Olympics, proclaims for himself a moratorium on the whole business. He goes further and prophesies the coming collapse of professional sport as we know it, for it has become a total humbug. It will take time, of course. The ancient Olympic Games lasted more than a millennium. But things move faster today and, if a thousand ages in the sight of God are but a moment gone, as the hymn has it, still a century of modern professional sports, albeit a milli-second in God's eye, is

G.B. Tennyson, only very occasionally leaves his teaching duties at UCLA to spend a day at the races.

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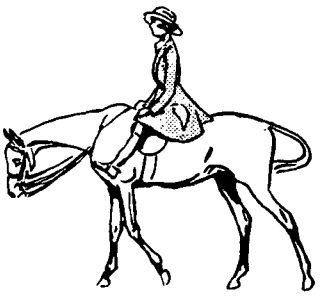
plenty long enough. Anyone who has reached the age of reason, as it used to be called, can supply the details: the rapacious commercialism, the towering vulgarity and petulance of the players, the increasingly prohibitive costs to spectators and even to the taxpaying public at large, the aggressiveness of the play and consequent incitement to aggressiveness by the spectators, the money and fixing scandals, the drug addictions, the doping of athletes, the often felonious rape-and-pillage conduct of those same players, the bloated salaries and profits from endorsements, and more. Ancient Olympians used to sell their sweat, so at least you got the real thing. We market cologne and clothing in the name of players who have had nothing to do with making the product. All of this damages what used to be called public morals on a scale equalled only by the example of the Oral, oops, Oval Office.



Title IX's damage results from schools having to eliminate successful men's programs in order to introduce such lunacies as women's soccer, as though UCLA were really St. Trinian's.

And yet, we know that athletics has long had a salutary influence on individuals and society, from the original Olympics heralding a temporary cessation of battle among city states as well as being a religious ceremony on to the nineteenth century (the seedbed of most modern sports) when the great Thomas Arnold reformed the brutal public (read, private) school system in England with the introduction of sports and chapel in a gentlemanly Victorian echo of the function of the classical games. By the end of that century the modern Olympics were introduced. By the end of this one, all of these activities have been corrupted beyond redemption. Compulsory chapel is now as defunct as prayer in the American public schools. All that is left is a congeries of professional gladiatorial contests conducted under other names. Accustomed to the more or less unbroken flow of a soccer game, a British cynic gave a definition of American football that runs something like this: prolonged committee meetings interrupted by occasional action. Criticus would amend that and apply it to most professional sports: occasional action interrupted by brawls.

There is, however, one spectator sport that should appeal to the traditionalist, one that remains relatively unspoiled and unchanged over the centuries — the Sport of Kings. I commend it to all who have recoiled from the diseased and putrid abscess on society that is modern professional sports. Of course racing has had its excesses and scandals, too. This is after all a fallen world. But racing has not fallen as far as all the other sports.

Horse racing is said to be in a slump at present. Daily attendance and consequently daily handles (*i.e.* money bet) are static or down. Widespread legalized gambling, from Vegas to riverboats to Indian reservations has lured away some of the public previously attracted to racing. No doubt other factors are operative as well, not least the ever-expanding empires of alternative professional sports and the omnipresence of the in-house shrine of television (in Southern California there are now four full-time sports channels showing the usual rubbish). But racing is not likely to vanish, and if Criticus has his way, it will in future enjoy an upswing. Constant Readers and those who aspire to that lofty status will soon be thronging to the track. And the reasons for this are legion.

First is Antiquity. Racing must be the oldest of all sports. Before the first Olympic Games in 776 B.C. there were horse races. That alone should commend the sport to traditionalists. By contrast consider, the youth of other sports. No doubt boys kicked balls around fields, plazas, and village greens from time immemorial, but association football (soccer) dates from the nineteenth century. As does the inflated pig-bladder game that began life as rugby at the school of the same name under Thomas Arnold's superintendence and evolved into what is known in the colonies (Canadian and Australian as well as American) as football.

LIKEWISE, LADS doubtless sought to strike with bats at balls long before there were records, but American baseball, descended from the British game of "rounders," is acclaimed as the nineteenth-century creation of one Abner Doubleday. Cricket, the Brits aver, is a century or two older, its origins stretching back to the seventeenth century with various murky forerunners being spotted some long while before that. Criticus believes that it, too, was probably refined out of rounders (or degenerated from it), though cricket enthusiasts disdain such association lest the gentleman's game seem as common as baseball.

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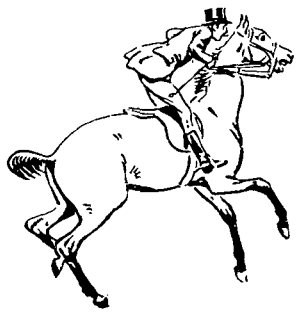
But today cricket stars are as drooled over as American baseballers, and behave as badly.

As for basketball, the very time and place and author of its creation are known to every schoolboy and possibly even to professional basketball players themselves; there is no gloss of hoary history upon that mindless activity. Downhill skiing was more or less invented by Sir Arnold Lunn at Arlberg in Austria in the nineteen twenties. Bless him, but down with the secret ski-maker subsidies for "amateur" skiers. The oldest important (non-racing) professional sport is probably tennis, which as *jeu de paume* dates back to the fifteenth or sixteenth century but only in the last generation has it embraced the coarseness of other professional sports and is now verging on the disgusting. At least tennis has effectively banished the bogus amateur status of professional players. Criticus recommends that all sports be ruled professional after a competitor reaches the age of 14. Twelve for female gymnasts. Then, stop watching.



True punters study the *Racing Form* the way ancient astronomers scanned the heavens for signs and portents. And, like the Magi, some must surely find them.

But these newcomers pale before the antiquity of horse racing. Racing comes trailing clouds of antique glory that link us with the earliest civilizations and with the amusements of the gods. Is even bull-fighting older? With antiquity comes tradition. No sport is more drenched in tradition than racing. The morning line, the paddock, the almost mediaeval identifying colors, the names of horses, indeed, the whole language of the track (of which more later), the post parade, and the thrilling tattoo of that bugle that gives no uncertain sound: "And they're off!"

WITH TRADITION comes also a body of learning that no other sport can claim. Yes, there are *idiots savants,* usually nine-year-olds or newspaper columnists, who can recite all the scores and statistics from all the World Series or all the Super Bowl participants or all the NBA's most valuable players, but these are not what I mean by learning. For that matter, when we think of all the horses and all the races that there have been dating solely from Eclipse in the eighteenth century (the parent sire from whom all modern thoroughbreds are descended), racing must have more statistics behind it than all the other sports combined. No nine-year-old could recite them.

But I am thinking not of facts about the historical record but of knowledge of the ways of the sport itself. Racing has more of it than any other sport. Knowing the barn, the breeders, the sire and dam, the trainers, the jockeys, the track record of the horses, their standing in the current meeting; understanding the odds, the type of race (claiming, maiden, etc.), the nature and condition of the track (turf, grass, fast, slow, wet, muddy), the distances, the weather. True punters study the *Racing Form* and other information sources the way ancient astrologers/astronomers scanned the heavens for signs and portents. And, like the Magi, some must surely find them. How else explain those extraordinary strokes whereby some bettors actually win the Pick Six by skill of choice and not by lottery-style chance? Criticus can't even manage a successful trifecta, but he has been known to salvage his day's expenditures with an occasional quinella. There are other times when a befuddled Criticus resorts to the beginner's much deplored habit of betting by name of horse. He once put a $2 bet on "Scalawag" in honor of an editor of his acquaintance, then put his real $5 money on "Southern Tempo" just to trump "Scalawag." Well, "Scalawag" ran third and "Southern Tempo," true to the name, ran completely out of the money. Ah well, another Lost Cause.

By while the complexities of the sport are enormous, the fundamental action remains transparently clear to the meanest mentality, a circumstance not always obvious to the uninitiated. Invited to accompany Criticus to Santa Anita, a moderately intelligent friend who had never been to the races declined, saying, "What's the point? One horse always wins." Well, barring the odd dead heat, yes. But that *is* the point. It is the point of all athletic contests. Somebody wins. The great glory of racing is that it is not the only point. Criticus left the moderately intelligent one at home and took as companion a semi-lapsed conservative, now crypto-anarchist, who had accompanied him in the past and who knows how to bet, and therefore how to lose.

Unlike so many other sports, the complexity that accompanies the simplicity of racing is rich indeed. Some

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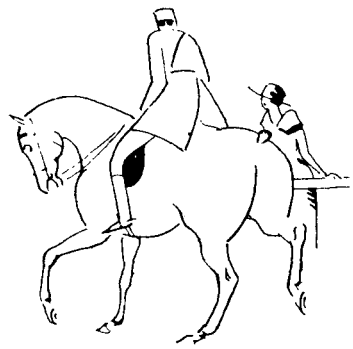
see subtlety in the passing prowess of an adroit quarterback or in the dodging and weaving of a skilled ball carrier; others rejoice at what they see as physical poetry in the intricate passing and tossing by basketball players; still others eye with awe the windup of a baseball pitcher or the stealth of a base stealer. But these are as Punch and Judy to the Shakespeare play that is horse racing. Certainly the essence is that several horses run from point A to point B and one of them gets there first. But everything that surrounds these short bursts is of a richness and variety unmatched by the experience of sitting in a stadium, increasingly an indoor one with artificial turf, watching one gang of steroidal bruisers shove another gang of bruisers up and down the field. Racing gives the groundlings the basic story line common to all other sports even as it alone delivers soliloquies to the literate.



Racing gives the groundlings the basic story line common to all other sports even as it alone delivers soliloquies to the literate.

TAKE A day at Santa Anita. First, there is the setting, which is about as spectacular as one is likely to find for any sports venue. The stands face the San Gabriel Mountains, often gorgeously snow-capped in winter, with the tracks and the palm-graced infield in between. Since racetracks are one-sided and not enveloped by opposing stands like a stadium, one's eye is constantly being invited to look outward at nature and, in the case of Santa Anita, upward as well. Even with less attractive settings, such as some eastern tracks where cities have encroached upon them as at Pimlico and Churchill Downs, the layout of a racetrack is a reminder that this is a bucolic sport, not a sweaty, enclosed, claustrophobic, and isolated one. If your horse doesn't come in, there is always something to look out upon other than a sea of faces contorted into shouts and roars by bands and prancing tarts.

Not that there aren't some curious visages to behold at the track. In fact, it is ideal for people- and oddity-watching in a way most difficult in other sporting venues. The Runyonesque characters that frequent the races seem made to be seen. And if you are Snob Criticus who goes only to the Club House, you have the right to visit the peasants in the Grandstand to see how the other half lives, though they may not in turn intrude into first class. Tradition again. Some of that other half appears to be spending their welfare money most unwisely. But that only makes going to the races the most interactive spectator sport in the world. One does not simply arrive and take up one's small spot in the sea of seats for the next few hours, broken only by laboriously engineered trips to the (in)conveniences. Rather, because there is approximately a half-hour between each race, one moves about the entire time, going from the stands to the betting windows to the food stations (which serve more varied and tastier things to eat than ever were offered at a professional or college game, from roast beef sandwiches to clam chowder, from beer to the hard stuff, with no third-quarter cut-off, either). One doesn't even need to return to the same seat, although reserved seats are available. One can sit or stand now here, now there. One can watch, standing or sitting, eating or drinking, from inside on the innumerable television screens spotted everywhere. One can even watch other tracks and other sporting events, rather like the sports book at Las Vegas (but why would you want to?). One can — horrors! — smoke because the stands are outside. Now that even charity bingo has been compelled by the Nanny State to ban smoking, let bingo players repair to the track and let Nanny take care of the charities. Meantime, boycott the state lottery.

BEYOND ALL that, it hardly need be said, one can bet. A little, a lot, or in between. Straightforward stuff like, say, $2 to win on "Ghibelline" (not, alas, running against "Guelph" in this race), or, of course, a bet that the horse will place or show. To say nothing of the more complex combinations — exacta, quinella, trifecta, daily double, pick three, parlay, pick six, pick nine, pick all. And more. Consult your program at the track for clarification of these categories, or send SASE and $5 to Criticus, so he can make up his loss on "Southern Tempo." Meantime, note that while race track betting is only marginally more likely to bring you winnings than casino gambling, it alone involves a measure of skill and knowledge. The wagerer at the races has something of a chance, whereas there is absolutely no way to calculate

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the throw of the dice or the spin of a wheel. It was Dostoyevsky at Baden-Baden, I seem to recall, who, seeing that red had come up eight times in a row, *knew* that the next time it would be black. He bet all. It came up red. No wonder he wrote *The Gambler.* At the same time, Criticus knows of a faculty wife (at another institution, of course) who was believed to have bankrupted the family because of her addiction to drink; whereas Criticus knew better, for he had seen her at the track, drunk certainly, but betting the mortgage. That's where it went. The moral of the story is, if you are a candidate for Gamblers Anonymous, don't go to the track. Otherwise, note that the standard bet is still $2, as it has been for as long as anyone now living can remember. There are even some special $1 bets. You could thus bet on every race on a nine-card day for less than $10.

On the other hand, you could go for the scenery, not just the nature and human scenery, but also the architecture. Both Santa Anita and Hollywood Park are gems of art deco architecture, each worth a trip for that reason alone. They have been modernized, of course, in terms of amenities, but not changed in any significant way. If, as I maintain, the world's most superb art deco structure was the original Bullock's Wilshire (cursed be he that sold that treasure) where the ground floor seemed the setting for Fred and Ginger to dance their way to paradise, then Santa Anita is where that couple would have danced their way to a day at the races. Even the green with which the buildings are painted seems to be an art deco color that you find nowhere else, a strange mint-*cum*-seaweed green. Not racing green but perhaps horse-racing green. The landscaping throughout is impeccable. It is a trip back in time but with all modern conveniences. And after the feature race, the eighth, when the pros are leaving without bothering to stay for the equine nobodies that run in the ninth or tenth, like clockwork the gulls appear, large double commas against the sky, wheeling and circling ever lower over the infield, waiting for the stands to clear so they can swoop down on the leftover food as though following the wake of a great ship.

Then, too, if you are sensitive to language, you will find that even in this department horse racing is conservative as well as colorful. The poet G.M. Hopkins praised God for the "pied beauty" that He had created in the infinite variety of things, Hopkins relishing among much else "all trades, their gear and tackle and trim." Rightly so, for all specialized activities have not only their own peculiar "gear and tackle" but also their own terms and language. Different sports develop individual vocabularies and phrases. In this racing is not unique, but being older it is more picturesque. The furlong as a measure survives only in racing, as knots and fathoms survive only at sea. Both mares and stallions run maiden races, and both, ahem, "break their maidens." But most traditional of all is the language of the track announcer and of written descriptions of races. Listen to that superb local track announcer Trevor Denman call a race and you will always hear: "As they pass the club house turn" ... and, "As they approach the three-quarter pole" ... and, "At the top of the lane." And some horse will always "come on gamely." The language is composed of largely unvarying, formulaic phrases that charm by their combination of familiarity and strangeness. Familiar because the phrasing is always very much as it was the last time, but strange in that such phrasing is encountered only at the track and hence is removed from your daily discourse.

All these things — the color, the tradition, the setting, the variety, the language — are in some measure at hand at any sporting event, but in racing more so. To appropriate Hopkins once again, a day at the races is "swift, slow; sweet, sour; adazzle, dim." To all the generations who "fathered-forth" such varied abundance: praise them. CPR

Norrington

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Voters approved the sale 2-to-1, as a result of innovative politicking, smart coalition building, and creation of grass roots support for what still is, one hopes, mainstream cultural values. LaPointe expressed disappointment the margin of victory was not larger. When the issue is a cross in a city with the culture and politics of San Francisco, she should not be so modest. CPR

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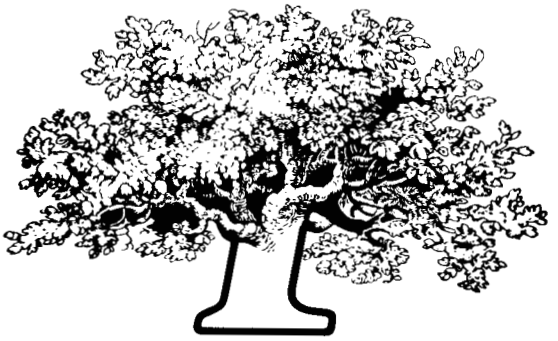

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